United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7245

B

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-7245

SCOA INDUSTRIES INC.,

Plaintiff-Appellant,

—v.—

FAMOLARE, INC.,

Defendant-Appellee.

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FILED
JUL 29 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Appendix

	Page
Docket Entries	1a
Complaint	4a
Opinion of February 13, 1976	7a
Application for Order to Show Cause	11a
Defendant's Second Supplemental Counterclaims	12a
"GET THERE" Trademark Registration	17a
Affidavits of Anderson, Montoya, Cislini, Thall and Ross	18a
Notice of Taking Depositions	35a
Transcript of Hearing, March 26, 1976	47a
Plaintiff's Exhibits 1 and 2	106a
Defendant's Exhibits A through Q	119a
Plaintiff's Proposed Findings of Fact and Affidavits	168a
Preliminary Injunction	181a
Findings of Fact and Conclusions of Law	183a
Notice of Motion for Rehearing and Reargument of Decision	189a
Notice of Appeal	191a

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE WYATT

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75- 3357 07 08 75 3 830 Jury demand dated

75 CIV. 3357

C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
COA INDUSTRIES, INC. VS. AMOLAPE, INC. J/18	For plaintiff: OSTROLENK, FABER, GERB & SOFFEN 260 MADISON AVENUE, N.Y.C. N.Y. 10016 685- 8470 For defendant: Mandeville & Schweitzer 230 Madison Avenue, NYC 10016 689 6967 -and- Kenyon & Kenyon Reilly Carr & Chapin 59 Maiden Lane, NYC 10038 425 7200 FISH & NEAVE 277 PARK AVENUE, N.Y.C. N.Y. 10017 826-1050

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By _____ Deputy Clerk

JN

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed X	Clerk	JUL 8	1975	82407		
J.S. 6 mailed	Marshal					
Basis of Action:	Docket fee					
ON INFRINGEMENT OF PATENT.	Witness fees					
Action arose at:	Depositions					

DATE		PROCEEDINGS	D. Jud
ul 8-75	1	Filed Complaint and issued summons.	
Jul 11.75	2	Filed Defts. Notice of Deposition of pltff. on 7-16-75.	
Jul 17.75	3	Filed Summons and marshals ret. Served: Famolare Inc. on 7-10-75.	
Jul 25.75	3	Filed Pltffs. Notice of Deposition of deft. by Joseph P. Famolare Jr. on 8-26-7	
07-28-75	4	Filed Stip & Order that the time for deft. to answer is extended for 30 days the new time to expire August 28,1975. Conner J.	
08-13-75	5	Filed ANSWER & COUNTERCLAIMS.	
08-27-75	6	Filed Pltffs. Answer to Counterclaims.	
09-02-75	7	Filed Pltffs. Notice of Deposition of deft. by Joseph P. Famolare Jr. on 9-22-	
10-17-75	8	Filed Defts. First Set of Interrogs. to pltffs. (Numbers 1 to 24)	
10-17-75	9	Filed Defts. Request to pltffs. production of documents (Nos. 1-16	
10-29-75	10-	Filed Notice of Apprarance for deft. along with Mandeville & Schweitzer by Kenyon & Kenyon Reilly Carr & Chapin.	
11-20-75	11	Filed Stip & Order that Pltffs. time to answer defts. 1st Set of Interrogs. & defts. request for production of documents is adjourned to 12-17-75. Wyatt J.	
1-26-75	12	Filed Deft. Notice of Motion & Motion to Supplement Defts. Answer. Ret. 12-5-75.	
1-26-75	13	Filed Defts. Memorandum of Law.	
1-26-75	14	Filed Defts. Supplemental Answer & Counterclaim.	
12-9-75	15	Filed stip & order Defts motion to supplement defts answer shall be granted & Pltff shall reply to defts supplemental answer and counterclaim on or bef 1-5-76. Wyatt, J.	
12-9-75	16	Filed memo endorsed on motiin filed 11-26-75: The within motion is allowed to be withdrawn, Wyatt, J. M/N.	
12-18-75	17	Filed pltffs response to defts request to pltff for production of documents, etc, as indicated.	
-5-76	18	Filed pltffs response to defts firstset of Interrogatories.	
1-6-76	19	Filed pltffs Request for admissions.	
1-6-76	20,	Filed defts Notice of Motion for a preliminary injunction to restrain, the pltff Scoa Industries, nc. its agents etc, from infringing defts Famalo registered copyright, etc, rtble before Wyatt, J. on 1-16-76.	
1-6-76	21	Filed defts memo of law in support of said motion.	
1-8-76	22	Filed Affidavit of Leo H. Famolare in support of defts motion for a prelim injunction.	
1-6-76	23	Filed Pltffs reply to defts supplemental answer and counterclaim.	
1-14-76	24	Filed Order to Show Cause for Partial Summary Judgment. Ordered dft. appear at this Court at Room 1106 on 1-16-76 for pratial summary judgment. Wyatt J.	
1-14-76	25	Filed Pltffs. response to motion for preliminary injunction & pltffs. motion for summary judgment.	
-15-76	26	Filed defts Statement purs to Rule 9 G.	
-15-76	27	Filed defts Reply in support of its motion for preliminary injunction and a to pltffs motion for p rtial summary judgment.	
2-3-76	28	Filed Notice of Appearnace that John C. Tramontine appear as additional a in the above action.	
2-3-76	29	Filed defts Answers and objedtions to pltffs request for admiss ions, etc, a	
2-13-76	30	Filed Opinion # 43885: Accordingly the motion for preliminary injunction is denied. The foregoing contains the findings of fact and conclusions of law. Wyatt, J. M/N.	
2-27-76	31	Filed defts Affidavit & Order to show cause why orders in the forms annex should not be entered etc, as indicat ed rtble before Wyatt, J. on 2-27- before 5:00 P.M. Wyatt, J.	
2-27-76	32	Filed defts Memorandum in support of itsapplication to show cause, as	

iv 3357 SCOA INDUSTRIES, INC. VS. FAMOLARE, INC. JUDGE WYATT

C. 110 Rev. Civil Docket Continuation

Pc 3.

DATE	PROCEEDINGS	Date Judgm
3-4-76	Filed Affidavits of Larry Anderson Silverio Montoya, Paul R. Cislini, Abe Thall and Milt Ross dtd 3-2-76.	
-4-76	Filed pltffs memorandum in opposition to appliation for preliminary injunction etc, as indicated.	
5-76	Filed stip & order that the hearing on defts application is extended to 3-19-76, Wyatt, J.	
:-76	Filed defts Amended answer to pltff request for admission No. 2.	Fee
-76	Filed Notice that deft will take deposition of Abe Thall on 3-16-76, as indicated.	
1-76	Filed Notice that deft will take deposition of Milton H. Ross, on 3-16-76,	
1-76	Filed Notice that deft will take deposition of Larry Anderson on 3-17-76.	
3-12-76	Filed Notice that deft Famolare, Inc. herby appeals to the U.S.C.A.P. from the orderof the District Court dated 2-13-76. Mailed Notice to Ostrolenk, Faber, Gerb & Soffen. 260 Madison Avenue, N.Y.C. N.Y. 10016	
17-76	Filed stip & order that the pltffs application be reset to 3-26-76. Wyatt, J.	
25-76	Filed defts reply memorandum in support of its aplication for preliminary injunction and for addition of counterclaims.	
25-76	Filed Affidavit of Paul R. Cislini Richard R. Parker and John O. Tramontine as indicated	
1-12-76	Filed Notice that the record on appeal in the above action has been certified and transmitted to the U.S.C.A.P. this date.	
1-12-76	Filed defts second supplemental counterclaims as indicated.	
1-16-76	Filed stip & order that the settlement of the Preliminary Injunction Order is adjourned to 4-20-76. Wyatt. J.	
1-21-76	Filed Findings of Fact and Conclusions of law, The preliminary injunction sought by Famolare shall issue, Wyatt, J. M/N.	
1-21-76	Filed pltffs findings of fact etc, as indicated.	
1-21-76	Filed Order that defts application to supplement defts answer and counterclaims is granted and defts answer and counterdlaims is supplemented by addition of the annexed defts second supplemental counterclaims. Pltff shall reply to defts second supplemental counterclaims within twenty days of the date of this order, Wyatt, J.	
4-21-76	Filed defts Notice of Motion for rearguing of decision etc, rtble before Wyatt, J. on 4-30-76. as indicated.	
4-21-76	Filed memo endorsed on motion filed 4-21-76. No oral argument is needed on this motion nor any further papers. The motion is denied, Wyatt, J. M/N.	
1-21-76	Filed Order that pltff Scoa Industries Inc. its officers, etc. are enjoined, until entry of final judgment in this action, from: Using the trademark "Get There" or any reproduction, counterfeit, copy or colorable imitation thereof, orally in writing, in connection with the sale, offering for sale, distribution or advertising of shoes, etc, as indicated, and it is further ordered that deft shall give security in the sum of $1,250.00 for the payment of such costs and damages as maybe incurred or suffered by pltff if pltff is found to have been wrongfully enjoined by this preliminary injunction. Wyatt, J. M/N.	
76	Filed Undertaking on Injunction in the sum of $1,250.00 National Surty Corp.	
3-76	Filed defts Notice of preliminary injunction. (Entry), by John O. Tramontine.	
1-76	Filed deposition dtd. 3-26-76.	
5-76	Filed true copy of an order from the U.S.C.A.P. that the above appeal may be withdrawn without costs and without attys fees and without prejudice.	
5-11-76	Filed pltffs answer to defts second supplemental counterclaims.	
5-13-76	Filed defts reply to pltffs counter counterclaim, etc as indicated.	
5-18-76	Filed Notice that Scoa Industries Inc. appeals to the U.S.C.A.P. from an order granting defts motion for a preliminary injunction dtd. 4-21-76. M/N.	
6-25-76	Filed stipulation and order designating exhibits to the U.S.C.A.	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 CIV. 3357

JUDGE WYATT

SCOA INDUSTRIES INC.,

Plaintiff,

v.

FAMOLARE, INC.,

Defendant.

Civil Action

No.

COMPLAINT

1. Plaintiff is a Delaware corporation having its principal place of business at 35 North Fourth Street, Columbus, Ohio 43215.

2. Plaintiff is informed and believes and therefore avers that defendant is a Delaware corporation having its principal place of business at 4 West 58th Street, in the City, County and State of New York and in the Southern District of New York.

3. The jurisdiction of this Court rests upon the ground that this civil action arises under the Patent Laws of the United States, Title 28, United States Code, Section 1338, and also under Title 28, United States Code, Sections 2201 and 2202. Venue is proper under Title 28, United States Code, Section 1391.

4. Plaintiff has, directly or indirectly through an associate, prior to the filing of this Complaint, authorized the manufacture for sale in the United States of shoes and/or soles in which the sole is of the cushion type and has crosswise undulating corrugations.

5. Defendant has, prior to the filing of this Complaint, asserted ownership of United States Design Patent 235,701 and has charged that plaintiff's manufacture or reproduction of shoes and/or soles in which the sole is of the cushion type and has crosswise undulating corrugations infringes said design patent and also infringes proprietary rights of unspecified trademarks and copyrights of defendant. Defendant has also threatened customers and prospective customers of plaintiff or its associates with legal action for the alleged infringement, and has threatened to attempt to seize and impound plaintiff's or its associate's said goods at United States ports of entry.

6. Said patent Design 235,701 has not been infringed by plaintiff, directly or indirectly, and is invalid and unenforceable.

7. No trademarks or copyrights of defendant have been infringed by plaintiff, directly or indirectly, and any that may be specified or charged to be infringed are invalid and unenforceable.

WHEREFORE, plaintiff prays for the Court's decree:

A. That the Design Patent 235,701 be declared invalid, unenforceable, and not infringed by plaintiff, directly or indirectly.

B. That defendant has no proprietary trademark or copyright rights that are valid, enforceable and infringed by plaintiff, direct or indirectly.

C. That the defendant, its officers, agents, servants, employees and attorneys, and those persons in active consort or participation with them, be enjoined from threatening, directly or indirectly, plaintiff, plaintiff's associates, and plaintiff's customers, with threats of legal action due to plaintiff's direct or indirect purchase, manufacture, use and/or sale of shoes and/or soles in which the sole is of the cushion type and has crosswise undulating corrugations, and further enjoined from attempting to have seized and impounded at the United States ports of entry, shoes and/or soles in which the sole is of the cushion type and has crosswise undulating corrugations which are imported by or on behalf of plaintiff, directly or indirectly through an associate.

D. For an award of the costs and disbursements of this civil action, including attorneys fees.

E. For such other relief as to the Court may seem just and proper.

OSTROLENK, FABER, GERB & SOFFEN

By: _____

Marvin C. Soffen
Attorneys for Plaintiff
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New York, New York 10016
(212) 685-8470

Of Counsel:

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Dowell & Dowell
2001 Jefferson Davis Hwy.
Suite 705
Arlington, Virginia 22202

V

SCOA INDUSTRIES, INC.
Plaintiff,
-v-
FAMOLARE, INC.,
Defendant.

75 Civ. 3357 IBW

#43885

FILED
U.S. DISTRICT COURT
FEB 13 3 24 PM '76
S.D. OF N.Y.

This is a motion by defendant (Famolare) for a preliminary injunction (Fed. R. Civ. P. 65) restraining plaintiff (Scoa) from infringing Famolare's registered copyright for "Sculpted Design on Shoe Sole," Copyright Registration No. GP 101119. Affidavits were submitted by both sides and it was stated for both sides at oral argument that no testimony was desired to be offered and that no evidentiary hearing was needed.

1.

Both plaintiff Scoa and defendant Famolare are engaged in the business of making and selling shoes. The present dispute between them centers around a design for a thick rubber shoe sole which features several pronounced corrugations (or "waves") on the bottom, a pattern of raised wavy lines on the sides, and another pattern of raised lines on the bottom with a bicycle design, the words "Get There", "Patent Pending" and "Made in Italy" also on the bottom.

MICROFILM

Famolare claims that this design was created by its president, Joseph P. Famolare, around January 1974. Famolare first marketed shoes with soles of the wavy design in the United States in September 1974 under the name "Get There." Prior to introducing "Get There" shoes to the retail market Famolare had displayed samples of shoes at the National Shoe Fair held in Chicago in March 1974. It appears that Scoa sent representatives to the Shoe Fair, who had the opportunity to examine Famolare's "Get There" shoes in advance of their introduction to the retail market.

The "Get There" shoe apparently received a good deal of favorable publicity and was well received by the public. Famolare says that by 1975, sales of "Get There" shoes accounted for more than one half of the company's total shoe sales for the United States.

Scoa introduced shoes with thick rubber soles, having a vague similarity in appearance to "Get There" shoes, at the National Shoe Fair held in March 1975. Thereafter, Scoa began offering these shoes for sale. Scoa does not use any words similar to "Get There" and does not use the bicycle design on the bottom; the bottom design is dissimilar in that the ridges are straight lines (not wavy) and are obviously to prevent slipping. The chief similarity is the appearance on the sides of both soles of wavy lines.

Scoa commenced this action on July 8, 1975. The complaint names Famolare as defendant and asks for declaratory and injunctive relief with regard to Famolare's claims of trademark and patent rights and copyright in the "wavy" shoe.

In its answer filed August 13, 1975, as supplemented pursuant to Stipulation and Order filed on December 9, 1975, Famolare asserted five counterclaims. Only the fifth counterclaim, alleging copyright infringement by Scoa, is relevant to the present motion.

Famolare then made this motion for a preliminary injunction.

There is jurisdiction under 28 U.S.C. § 1338(a).

2.

Famolare first applied on May 7, 1975, for registration of a claim to copyright in a "work of art or a model or design for works of art" (17 U.S.C. § 5(g)). It gave the title as "multi-curve sculpture" and described the "work of art" as "ornamental sculptured molded bottom for shoe uppers." It stated that the work was published on August 4, 1974. Two of the "Get There" shoes were sent.

Under date of May 16, 1975, registration was refused because the "molded bottom" contained no elements capable of independent existence apart from the utilitarian aspect.

Counsel for Famolare visited and argued with the Copyright Office but under date of July 18, 1975, there was a second refusal of registration. Among other things, it was specifically stated that the "waved" effect could not be copyrighted and that there could not be copyright in "the lines applied to the sides of the soles and those to the bottoms."

There was further argument with the Copyright Office and a second application for registration was made on September 15, 1975. The second application was also for a work of art but limited. The title was "Get There" and the description of the "work" was "sculpted design on shoe sole." This description refers to the bicycle design on the bottom of the sole and was calculated to secure registration, because the Examiner at an argument on September 11 had noted that possibly the bicycle design might have elements of a work of art.

On the basis of the bicycle design, registration on the second application was granted. This was made clear in a letter of the Copyright Office of September 19, 1975.

A certificate of registration was issued. The date is not shown but it must have been in September 1975 and after September 12.

3.

In order to obtain a preliminary injunction restraining copyright infringement, Famolare must establish that it is the owner of a valid copyright covering those elements of the shoe sole which Scoa has allegedly copied. Famolare has not done this.

Scoa has not copied the bicycle design, the sole basis for registration of Famolare's claim to copyright.

Scoa has copied only the wavy lines or ridges on the sides of the soles and possibly the troughs in the bottom of the soles.

The certificate of registration cannot becaccepted as prima facie evidence of a valid copyright to anything except the bicycle design.

There can be no valid copyright in troughs in the sole or wavy lines on the sides. These have no existence as works of art and if they did have lack even the minimum originality needed for copyright.

Famolare claims copyright protection for the copied features on the ground that they are "works of art." 17 U.S.C. § 5(g). What is a "work of art" may require a subjective judgment.

The Regulations of the Copyright Office provide some guidance in this matter. Section 202.10, 37 C.F.R. (1975), provides in relevant part:

> "(c) If the sole intrinsic function of an article is its utility, the fact that the article is unique and attractively shaped will not qualify it as a work of art. However, if the shape of a utilitarian article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work of art, such features will be eligible for registration."

A shoe sole is an object whose intrinsic function is utilitarian. There are, of course, works of art which also serve a utilitarian function. The classic example is a statute used as a lamp base. Mazer v. Stein, 347 U.S. 201 (1953). It is clear that a statue can be identified as a work of art independent of its utilitarian aspects.

It is concluded, in agreement with the Copyright Office, that the troughs, waves, and lines which appear on the shoe sole cannot be identified and do not exist independently as works of art. This being the case, Famolare has no claim of valid copyright as to the features of the shoe sole which Scoa has allegedly copied.

Accordingly, the motion for preliminary injunction is denied.

The foregoing contains the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a).

SO ORDERED.

Dated: February 13, 1976

Inzer B. Wyatt
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FEB 27 19
S. D. N. Y.

SCOA INDUSTRIES, INC.	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.,	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

ORDER TO SHOW CAUSE

Defendant's application for an Order To Show Cause, and the affidavit and memorandum in support of such Order, having been duly considered by the Court, IT IS HEREBY ORDERED that:

1. Plaintiff shall show cause before this Court on March 5, 1976 at 2:30 P.M., in Room 318, or as soon thereafter as counsel may be heard, why orders in the forms annexed should not be entered.

2. A copy of this Order, together with the papers on which it is based shall be served on attorneys for plaintiff by attorneys for defendant before 5:00 P.M., on February 27, 1976.

3. Plaintiff's papers in opposition to the entry of orders in the forms annexed to the application for this Order To Show Cause shall be served and filed before 5:00 P.M. on March —, February 27, 1976.

Inzer B. Wyatt
U.S.D.J.

Dated: New York, New York
February 27, 1976

(31)

AFFIDAVIT SUBMITTED WAS CONWAY AFFIDAVIT - NOW DEFENDANT's EXHIBIT F (see page 125a)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SCOA INDUSTRIES, INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.,	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

DEFENDANT'S SECOND SUPPLEMENTAL COUNTERCLAIMS

Defendant hereby supplements the Answer and Counterclaims of Defendant as follows:

For Its Sixth Counterclaim

49. This is a counterclaim for infringement of defendant's trademark "GET THERE," registered under the Trademark Laws of the United States, Title 15, United States Code, Chapter 22. Jurisdiction is founded on Title 28, United States Code, § 1338 and on Title 15, United States Code, § 1121.

50. Replead the averments of paragraph 11 of this Answer.

51. Defendant is and always has been the sole owner of all right, title and interest in and to the trademark "GET THERE" and of the registration thereof, together with the business and goodwill identified with and symbolized by said trademark.

52. On March 25, 1975 said mark was registered in the United States Patent and Trademark Office on the Principal Register under Trademark Registration No. 1,007,435 covering the use of said mark on shoes. Said registration is now valid and subsisting.

53. Beginning on or about March 1, 1974, defendant has used the mark "GET THERE" to identify and distinguish certain of its shoes, made by defendant and sold by defendant throughout the United States including the State of California. Defendant has used said trademark "GET THERE" on those shoes and in connection with the sale and advertising thereof.

54. Defendant has expended large sums of money in nationally advertising its "GET THERE" shoes, and has built up an extensive and valuable business in the manufacture and sale of its "GET THERE" shoes. Defendant has endowed its "GET THERE" trademark with widespread and extremely valuable goodwill.

55. Without consent of defendant, and after defendant had extensively advertised its "GET THERE" shoes and had built up extensive and valuable business and goodwill in connection with said trademark, plaintiff has commenced to use in commerce the words "GET THERE" in connection with the sale, offering for sale, distribution and advertising of plaintiff's shoes.

56. The use of the words "GET THERE" by plaintiff is likely to cause confusion with defendant's trademark "GET THERE," or to cause mistake or to deceive in connection therewith, and their use by plaintiff is likely to cause the public to believe that plaintiff's shoes are defendant's "GET THERE" shoes or that plaintiff's shoes are sponsored by or are in some way connected with defendant or defendant's "GET THERE" shoes.

57. The use of said words "GET THERE" by plaintiff is an infringement of defendant's registered trademark.

58. Upon information and belief, plaintiff's acts as alleged in paragraph 55 herein have been willful and with knowledge of defendant's "GET THERE" registered trademark and with the intent to cause confusion with defendant's trademark "GET THERE", or to cause mistake or to deceive in connection therewith.

59. Defendant has been damaged by said infringement, and plaintiff has profited thereby. Said infringement will continue, to defendant's irreparable injury, unless enjoined by this Court.

WHEREFORE, defendant prays:

12. That an injunction be issued restraining, pendente lite and permanently, plaintiff, its officers, agents, servants, employees, and those persons in active concert or participation with them from manufacturing, marketing, distributing, selling, offering for sale, or advertising any shoe or shoe product not defendant's, under or bearing the trademark "GET THERE," or any other trademark confusingly similar to defendant's trademark "GET THERE."

13. That plaintiff be ordered to deliver up for destruction all labels, signs, prints, packages, receptacles, advertising, promotional material, stationery or business cards in its possession bearing the trademark "GET THERE," or any other trademark confusingly similar to defendant's "GET THERE" trademark.

14. For an accounting to defendant of all the profits derived by plaintiff and for the damages sustained by defendant by reason of the wrongful acts of plaintiff complained of herein.

15. For judgment in a sum not exceeding three times the amount of such profits and such damages or such amount as the Court shall deem just and proper according to the circumstances of the case.

16. For defendant's costs herein, including reasonable attorneys' fees.

17. For such other and further relief as the Court may deem just and proper.

For Its Seventh Counterclaim

60. This counterclaim for patent infringement is brought under the Patent Laws of the United States, Title 35, United States Code. Jurisdiction is founded on Title 28, United States Code, § 1338(a).

61. On February 10, 1976, United States Letters Patent No. 3,936,956 ("Utility Patent") were duly and legally issued to defendant for an invention entitled "Reflex Action Sole For Shoes Having Sinuous Contoured Bottom Surface," and since that date plaintiff has been and still is the owner of that Utility Patent and of all rights of recovery thereunder.

62. Upon information and belief, plaintiff has been and now is infringing that Utility Patent by selling shoe soles (with uppers) which embody the invention of that Utility Patent.

63. Defendant has been damaged by plaintiff's infringing activities.

64. Upon information and belief plaintiff will continue to infringe that Utility Patent to defendant's irreparable injury unless enjoined by this Court.

WHEREFORE, defendant prays:

18. For judgment that defendant is the owner of United States Letters Patent No. 3,936,956; that said patent is good and valid in law; and that said patent has been infringed by plaintiff.

19. That an injunction be issued enjoining plaintiff, its officers, agents, servants, employees, and those persons in active concert or participation with them from any further infringement of said patent, No. 3,936,956.

20. That an accounting be had for the damages arising out of plaintiff's infringement, not less than a reasonable royalty, and that the damages so ascertained be awarded to defendant togetner with interest.

21. That defendant be awarded its attorneys' fees, costs and expenses herein, together with such other and further relief as this Court may deem just and proper.

FISH & NEAVE

By _____
John O. Tramontine

Attorneys for Defendant
277 Park Avenue
New York, New York 10017
Telephone (212) 826-1050

Int. Cl.: 25

Prior U.S. Cl.: 39

United States Patent Office

Reg. No. 1,007,435
Registered Mar. 25, 1975

TRADEMARK
Principal Register

Get There

Famolare, Inc. (Delaware corporation)
4 W. 58th St.
New York, N.Y. 10019

For: SHOES, in CLASS 25 (U.S. CL. 39).
First use on or about Mar. 1, 1974; in commerce on or about Mar. 1, 1974.

Ser. No. 19,501, filed Apr. 22, 1974.

P. P. GRALNICK, Supervisory Examiner

Exhibit 1

AFFIDAVIT OF LARRY ANDERSON

STATE OF CALIFORNIA)
) ss.
COUNTY OF Tulare)

I, LARRY ANDERSON, being first duly sworn, depose and say:

1. I am the store manager of Gallenkamp's store at 2129 South Mooney Boulevard, Visalia, California in the Visalia Fair Shopping Center. This store is a retail outlet of SCOA Industries Inc., a Delaware corporation.

2. As store manager, I have supervisory responsibility for all advertisements which are run in the local newspaper (The Visalia Times Delta) on behalf of my store.

3. On January 22, 1976, an advertisement appeared on behalf of my store in The Visalia Times Delta for a "ripple" soled lace-up ladies' oxford shoe at ~~$15.99~~ $14.90 each.

4. It is the usual custom and practice for me to receive from the district manager a "slick," together with accompanying text for any advertisement to be run in the newspaper on behalf of my store. A "slick" is a glossy print suitable for newspaper publication. It is the usual and customary practice for me to receive a pre-printed "slick" from my district manager. In this particular instance, I had not received either the "slick" or the accompanying text prior to my conference with the advertising representative of The Visalia Times Delta regarding the use of this particular advertisement.

5. A few days prior to January 22, 1976, I met with Paul Cislini, the advertising representative for The Visalia Times Delta, at my store in regard to the advertisement. The assistant store manager, Silverio Montoya, was also present at the meeting, although he was also engaged in other duties at the time. The particular advertisement in question resulted from the conference between Mr. Cislini and myself. As stated, I had

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not received either the "slick" nor the accompanying text for the "ripple" soled shoe advertisement. My store was in the midst of remodeling at the time and things were in a general state of confusion.

6. For a picture of the "ripple" soled shoe, I tore out a picture of a finished advertisement from the Spring and Summer "MATS" Service supplied to my store by our company. A "MATS" picture consists of a picture of a finished advertisement indented in a backing. The "MATS" catalogue consisted of a book of finished Gallenkamp ads. Insofar as possible, we used the pre-printed text accompanying the MATS advertisement. Mr. Cislini then asked how the shoe could be described and I said that it had a "ripple" sole and was similar to the "Get There" shoe, but that we could not call it the "Get There" shoe because "Get There" is a brand name of a shoe made by another company. Mr. Montoya, the assistant manager of the store, was present at the time I made this statement and heard that it was made.

7. After my conference with Mr. Cislini, I had no further discussion with him in regard to the content of the advertisement. Nor did I see the proof of the advertisement prior to its running in the newspaper on January 22nd.

8. I did not at any time authorize the use of the descriptive phrase "Get There" in connection with the advertisement for the "ripple" soled ladies' oxford offered for sale by our store in the advertisement which ran January 22, 1976 in The Visalia Times Delta nor did I see the finished proof of the advertisement prior to its publication. If I had seen the finished proof or had it been called to my attention that the descriptive language "Get There" was contained in the advertisement, I would not have authorized its use or publication in any manner.

9. I am aware of and did in fact see prior memoranda

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from Milt Ross from our Los Angeles regional office wherein all SCOA personnel were admonished not to use the brand names of any other manufacturer in their advertising copy and I was acting on the basis of the material contained in said memoranda, together with my own common business knowledge, when I informed Mr. Cislini that the phrase "Get There" could not be used in connection with said advertisement. Prior to my conference with Mr. Cislini, as well as prior to the publication on January 22, 1976 of the advertisement in question, I never saw any "slick", accompanying text, nor any memorandum put out by our company relating to the advertisement for the "ripple" soled ladies' shoe. Had I seen same or had it been called to my attention, I would have used the "slick" and advertising text prepared by our company for that purpose.

10. To the best of my knowledge the advertisement which appeared on January 22, 1976 was published on one occasion only. I have since informed The Visalia Times Delta not to publish the advertisement in question in any further edition.

11. I would never knowingly use in any advertising copy subject to my approval the brand name, trademark or trade name of any competitive shoe manufacturer. Nowhere did the words "Get There" appear in any written advertising text or copy prepared by me.

I declare that I have personal knowledge of the matters set forth herein and if called as a witness, I can testify as to the matters herein set forth.

Further affiant sayeth not.

Larry Anderson

Subscribed and sworn to before me
this 2nd day of March, 1976.

Marilyn J. Kay
Notary Public in and for said
County and State

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LAWYERS
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Los Angeles, California 90017
Telephone (213) 687-0711

AFFIDAVIT OF SILVERIO MONTOYA

STATE OF CALIFORNIA)
) ss.
COUNTY OF Tulare)

I, SILVERIO MONTOYA, being first duly sworn, depose and say as follows:

1. I am the assistant manager of the Gallenkamp shoe store located at 2129 South Mooney Boulevard, Visalia, California in the Visalia Fair Shopping Center. I have been employed in the shoe business for approximately six (6) years.

2. On or about January 20, 1976, I was present at a meeting between Larry Anderson, the store manager of my store, and Paul Cislini, the advertising representative of The Visalia Times Delta. Although I was engaged simultaneously with other duties, I was generally aware of what was being discussed at the meeting. One of the matters discussed was a prospective advertisement for a "ripple" soled lace-up ladies' oxford shoe offered by our store for $15.99 each. During the course of the discussion, Mr. Cislini asked Mr. Anderson how best the shoe could be described. In response, Mr. Anderson told Mr. Cislini that the shoe was similar to the "Get There" shoe but that the descriptive terminology "Get There" could not be used in the advertisement because it was the brand name of a competitor. Mr. Anderson told Mr. Cislini that it would be improper for us to use any brand name of a competitor, whether it be "Get There", Adidas, "Hush Puppies" or "Earth" shoes in connection with any advertisement run for our shoes.

I declare that I have personal knowledge of the matters set forth herein and if called as a witness, I can testify as to the matters herein set forth.

Further affiant sayeth not.

Silverio Montoya
Silverio Montoya

Subscribed and sworn to before me
this 2nd day of March, 1976.

Marilyn J. Law
Notary Public in and for said County and State

IVERSON, YOAKUM, PAPIANO & HATCH
LAWYERS
611 West Sixth Street, Suite 1900
Los Angeles, California 90017
Telephone (213) 687-0711

AFFIDAVIT OF PAUL R. CISLINI

STATE OF CALIFORNIA)
) ss.
COUNTY OF Tulare)

I, PAUL R. CISLINI, being first duly sworn, do depose and say as follows:

1. I am currently employed as the Promotion Manager of the Visalia Times Delta, Visalia, California.

2. During the month of January, 1976, I was, in addition to my duties as Promotion Manager, also serving as the Times Delta's advertising sales representative servicing the Visalia Fair Shopping Center in Visalia, California. At that time, I had been functioning as sales representative to the Visalia Fair Shopping Center for approximately three (3) years.

3. On or about January 20, 1976, in my capacity as sales representative, I had a conversation with Mr. Larry Anderson concerning a display advertisement to be run in the Visalia Times Delta on Thursday, January 22, 1976. Mr. Anderson is the manager of the Gallenkamp Shoe Store located in the Visalia Fair Shopping Center. The above-mentioned conversation took place in the Visalia Gallenkamp Shoe Store at 2129 South Mooney Boulevard, Visalia, California.

4. During the course of my conversation with Mr. Anderson, he cut from Gallenkamp's Spring and Summer "Mats" Catalog a picture of a shoe which was to be used in the advertisement in question, which picture he presented to me. He also cut from the Catalog a printed price and a border heading in the type styles which he wished to be used. No other pre-printed matter was presented to me by Mr. Anderson to be used in the January 22, 1976, advertisement. The

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remaining copy to be used in the display, in addition to the pre-printed shoe illustration, price and border, was given to me orally by Mr. Anderson. I personally took notes on the copy to be used.

5. After concluding my conversation with Mr. Anderson, I returned to my office at the Visalia Times Delta and, from the notes I had taken of our conversation, made up the lay-out for the January 22, 1976, advertisement. In accordance with regular policy of the Visalia Times Delta, my notes of my conversation with Mr. Anderson were destroyed approximately one week after the display advertisement was published on January 22.

6. Also in accordance with Times Delta policy, the Gallenkamp advertisement was published on January 22, 1976, without being presented to Mr. Anderson for proofing, or approval. Newspaper policy is to present for final approval by advertisers only those advertisements in excess of forty (40) column inches. The January 22, Gallenkamp Shoe advertisement was three inches by seven inches, or twenty-one (21) column inches.

7. The circulation of the Visalia Times Delta, according to an Audited Bureau of Circulation report, dated September 30, 1974, is approximately 16,505.

I declare that I have personal knowledge of the matters set forth herein and if called as a witness I can testify as to the matters stated herein.

Paul R. Cislini
PAUL R. CISLINI

Subscribed and sworn to before me
this 2nd day of MARCH, 1976.

David L. Rauber
Notary public in and for the said
County and State

DAVID L. RAUBER, NOTARY PUBLIC
My Commission Expires April 22, 1978
Tulare County California

IVERSON, YOAKUM, PAPIANO & HATCH
LAWYERS
611 West Sixth Street, Suite 1900
Los Angeles, California 90017
Telephone (213) 687-0711

STATE OF OHIO)
)
COUNTY OF FRANKLIN) ss.

Abe Thall, being first duly sworn, says that he is the Manager of Advertising, Sales Promotion And Display for Shoe Corporations of America, the Retail Footwear Division of SCOA Industries Inc.; that he is responsible for the preparation of the advertisements for the Gallenkamp and Schiff Shoe Stores operated by said Division; that he is also generally familar with the advertising done by the Conventional and Discount Shoe Department Operations of said Division; that on February 27, 1976, Louis G. Dougherty, Senior Vice President of SCOA Industries Inc., who is in charge of its Footwear Operations, called him - Abe Thall - to the former's office and told him of information just received to the effect that one of our shoe store ads contained the phrase "Get There" and that said Mr. Dougherty was very upset about it; that Mr. Dougherty directed him to immediately contact all general managers of the Retail Footwear Operating Subdivisions to remind them, and for them to promptly in turn remind all regional managers, district managers and unit managers that no advertising shall contain or refer to the "Get There" name or "Famolare" name; that upon such direction, he did so contact the general managers of the Retail Footwear Operating Subdivisions, and conveyed to them such instructions and reminders; and that he is aware of, and enforces to the best of his ability, the general policy of SCOA Industries Inc. to not use in any of its advertisements the trade names and brand names of other parties.

And further affiant saith not.

Abe Thall

Sworn to before me and subscribed in my presence this day of March, 1976.

Notary Public

WILLIAM K. FRIEND
ATTORNEY AT LAW
NOTARY PUBLIC - STATE OF OHIO
MEETIME COMMISSION

AFFIDAVIT OF MILT ROSS

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, MILT ROSS, being first duly sworn do depose and say as follows:

1. I am the Operations Manager for the West Coast operations of Gallenkamp's Shoes, a division of SCOA Industries Inc., a Delaware corporation. My place of employment is the West Coast office located at 8300 Santa Monica Boulevard, Los Angeles, California 90069.

2. As Operations Manager, part of my duties involves the coordination of advertising by the retail stores of the Gallenkamp division. Approximately 90% of the advertising done by the retail stores is standardized in terms of timing, content and prices.

3. On or about January 8, 1976, I sent a memorandum to all store managers, district managers and regional managers in the Northwest sector (including the State of California north of Bakersfield) regarding a promotional campaign which was to include newspaper advertising for our "Wavy Bottom" shoe, a ripple soled lace-up ladies' oxford, selling for approximately $15.99 a pair. A copy of this memorandum is attached to this affidavit and incorporated by reference as Exhibit A. Attached to the memorandum was an advertising "slick" together with accompanying text prepared by the Advertising Department of SCOA Industries Inc. in Columbus, Ohio. My instructions from the Advertising Department in Columbus in connection with this promotional campaign were to run the advertisement exactly as prepared by the Advertising Department. Accordingly, as set forth in said memorandum, I instructed my store managers, district managers and regional managers that under no circumstances were they to change the wording of the copy in the advertisement for the "Wavy

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Bottom" shoe.

4. To my knowledge, all of the advertisements placed in newspapers in connection with the promotional campaign for the "Wavy Bottom" shoe were in accordance with the "slick" and advertising copy prepared by the Advertising Department in Columbus, with the exception of the advertisement which ran in The Visalia Times Delta on January 22, 1976. I do not know how the descriptive phrase "Get There" appeared in said ad nor did I authorize any one in our organization to utilize the words "Get There" in connection with said advertisement. In my memorandum (Exhibit A), I stated that the promotional campaign for the "Wavy Bottom" shoe was to commence Thursday, January 29, 1976 and run through Sunday, February 1, 1976. I did not authorize the placing of the advertisement which appeared in The Visalia Times Delta on January 22, 1976. As stated, it is my custom and practice to instruct my store managers, district managers and regional managers not only as to content of advertisements but timing as well. In this particular case, my specific instructions were not followed.

5. It is my custom and practice as part of my business duties to periodically advise my store managers, district managers and regional managers and to warn them against using established brand names, trade names or trademarks of competitive manufacturers. For example, I have heretofore issued written instructions to avoid using the phrase "Vegeterian" in connection with certain shoes manufactured by Gallenkamp's and to likewise avoid the use of the phrase "Earth" in connection with promotional campaigns. A copy of a memorandum from our office dated June 3, 1975 in regard to the "Vegeterian" designation is attached hereto and incorporated by reference as Exhibit B. Copies of memoranda, dated November 7, 1975, and February 5, 1976, in connection with the use of the word "Earth" in promotional campaigns are attached hereto and

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incorporated by reference as Exhibits C-1 and C 2, respectively.

6. I had no personal knowledge of the copy contained in the advertisement in The Visalia Times Delta of January 22, 1976 prior to its appearing in said newspaper nor did I authorize the placement of same.

7. With respect to this particular promotional campaign for the "Wavy Bottom" shoe, we had originally scheduled to run the advertisement in December, 1975 but subsequently decided to postpone it. In December, 1975, I sent a "Calendar of Events" to my store managers, district managers and regional managers in which I instructed them that the advertisements must be run as the copy read, in all cases. Attached hereto and incorporated by reference as Exhibit D is a copy of this document.

8. I declare that I have personal knowledge of the matters set forth herein and if called as a witness, I can testify as to the matters herein set forth.

Further affiant sayeth not.

Milton M. Ross
Milt Ross

Subscribed and sworn to before me
this 22nd day of March, 1976.

Michael E. Tully
Notary Public in and for the said
County and State

(SEAL)

OFFICIAL SEAL
MICHAEL E. TULLY
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires May 21, 1979

IVERSON, YOAKUM, PAPIANO & HATCH
LAWYERS
611 West Sixth Street, Suite 1900
Los Angeles, California 90017
Telephone (213) 687-0711

28a

MEMORANDUM

TO: All Unit Managers-DM-Rohde and Thornton Region-GK West
All Fresno Unit Managers-DM-Ramirez Region-GK West

FROM: Milt Ross

DATE: January 8, 1976

SUBJECT: Advertisements

The attached is a copy of the lay-out for the ad to run in your respective papers on Thursday, January 29th thru Sunday, February 1st, 1976, with the approval of your DM or RM. The ad cuts and art work for this lay-out, may be found in your mat service or on slicks from our Columbus Office. Under no circumstances, are you to change the wording of the copy which describes the shoes in the ad.

The ad scheduled for Thursday, January 22nd, 1976, which was to be our final clearance sale, will be cancelled due to the excellence in disposing of the sale merchandise. The RMs inform me that a fine job was done by all in clearing the stock, however, a special effort should be made to clear any remaining sale shoes as soon as possible. In order to do this, it is imperative that you continue to display your sale shoes, using the $1., $3., and $5. sale prices, as previously planned.

The promotion to run on Thursday, January 22nd, 1976, will be announced as soon as a selection has been made.

MARK-DOWNS

Women's Novelties	Stock # 7-0160-852	From: $16.99	To: $14.99
Women's Novelties	Stock # 7-0160-857	From: $16.99	To: $14.99 - $1.00PM

Milt

We're going to be # 1

"Best in the West"

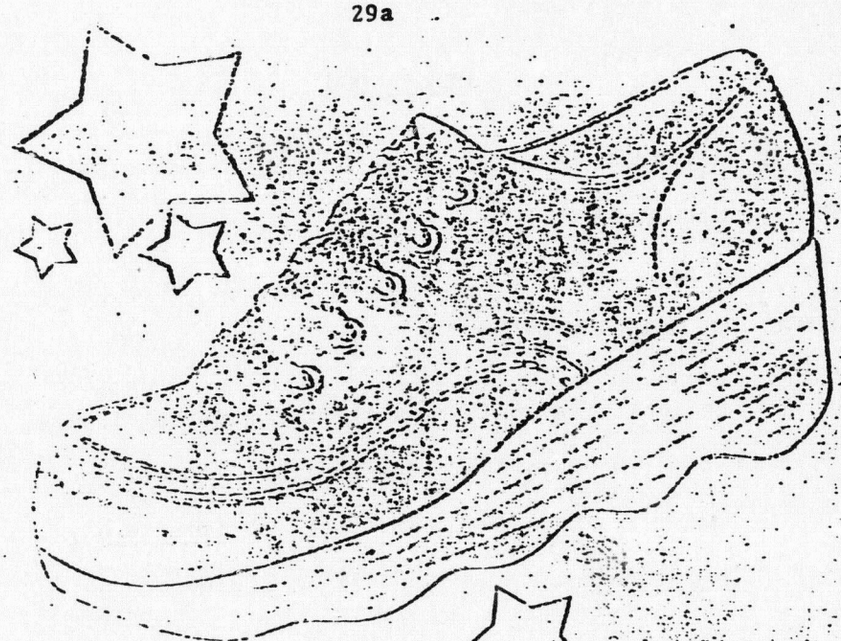
MR/er
Attachment

EXHIBIT A

BEST COPY AVAILABLE

Mr. Gallenkamp, you've done it again!

29a



Mr. Gallenkamp, you've done it again! Right-on styling that lets you ride the heights of fashion. Butter soft uppers set on high wavy soles treat you to the ultimate in comfort. Choose the oxford in black, navy, tan or the t-strap in tan. Both in women's sizes to 10. They're the greatest fashion around. Right on, Mr. Gallenkamp!

12.99

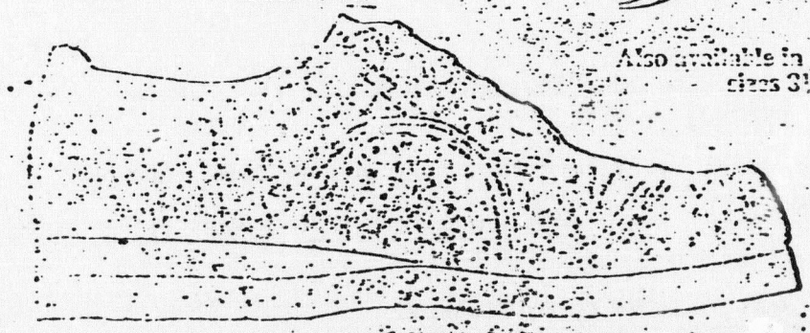
Sportabouts

Really dyn-o-mite. For pants, for skirts. Wedge plantation crepe soles for that light bouncy feeling. In brown. Women's sizes to 10.

9.99

Reg. 13.99

Also available in girls' sizes 3½ – 4



Gallenkamp

Keeps America On Its Feet!

BEST COPY AVAILABLE

B

MEMORANDUM

TO: ALL STORE MANAGERS, R.M.'S, D.M.'S - GK WEST

FROM: John Kekich JK

DATE: June 3, 1975

SUBJECT: WEDGETARIAN SIGNS

Because of a conflict with the soup-can display of our Wedgetarian signs and the Campbell Soup Company, it is necessary that you immediately throw away the cards and signs listed below:

1. The hanging Wedgetarian sign (in the shape of a soup can) you have hanging in your window.

2. The hanging Wedgetarian sign you have in your store.

3. The window card that resembles a soup can on a stick (save the stick and base for future use).

4. The 10 x 15 sign you use in the store.

It is very important that you do this immediately. R.M.'S & D.M.'S PLEASE FOLLOW THROUGH

cc: M. Ross, A. Thall, D. Tishkoff

JK:d

EXHIBIT B

— 31a —

C-1

MEMORANDUM

TO: Milt Ross

FROM: Abe Thall

DATE: November 7, 1975

SUBJECT: Use of Word "Earth" in Ads or Display

We were challenged by the attorneys for Mrs. Kelso, for using the expression "Down-To-Earth" in an ad in our Discount Division.

George Freise recommended we do not use the word "Earth".

We are attaching a copy of a letter that we sent to her attorney.

Please make sure that none of your stores use the word "Earth" in any ads. The same thing applies if they make up any display locally.

AT/tb
Attachment

xc: John Kekich

RMs

Please follow through

JMR

Office
11/20 MAIL

OFFICE OF MILT ROSS
GALLENKAMP WEST
8300 SANTA MONICA BLVD.
LOS ANGELES, CALIF.

FEBRUARY 5, 1976

PLEASE READ-IMPORTANT

In the future, whenever running ads on the "EARTH TYPE" shoe, please be certain that you do not use the word "EARTH" in any way, as this slogan is registered by another company.

In the past, we have referred to this type of shoe as the "SUPER-NATURAL" shoe and it is advisable to continue to use this term with the approval of your District or Regional Manager.

****

In your recent shipments of tennis shoe boxes, you received some boxes imprinted with the name "SCATS", America's Action Shoe by Gallenkamp. Enclosed in these boxes were plastic bags with the same imprint. When selling a pair of these tennis shoes, please use the "SCATS" bag, rather than our usual shoe bag, as these bags are distinctive and make a marvelous advertising item. You will be receiving more of these bags in the future.

****

After you trim your windows with the new Spring background, be sure all the sale shoes are removed from your windows, along with the sale signs. Please gather together all the remaining sale shoes from the sale racks, tables, and trollys, and display them in the rear of the store.Your sale signs in the interior of the store should be replaced with the new hanging cards which you recently received from our Columbus Office.

****

ATTENTION: ALL MANAGERS

According to information received from our Columbus Office, all payroll checks are mailed at noon on Wednesdays, never later than 4 P.M., and therefore, the late arrival of these checks on some occasions must be due to the Postal Service.

Thankyou,

MR/er

EXHIBIT C-2

33a

Book D

OFFICE OF MILTON ROS
GALLENKAMP WEST
8300 SANTA MONICA BLVD.
LOS ANGELES, CALIFORNIA

"CALENDAR OF EVENTS"
DECEMBER 1975

The exciting Christmas Holiday Season is upon us and our December Promotional Calendar is outstanding. All stores must promote the items as scheduled on this "Calendar of Events" unless instructed otherwise.

Your District or Regional Manager will advise you if you should run any of the "Directed Ads", however, all promotions are "In Store Events", and will start on the dates indicated.

Make certain that you display 5 to 6 pairs of these fantastic values in your windows. Let's hear that register ring!!

All "Directed Ads" will run in the LOS ANGELES TIMES on the dates shown below.

Thursday, November 27th thru Sunday, November 30th

MOPS and SCUFFS

7-5127-229	Hot Pink	$2.90	7-5107-235 Black Scuff	$2.90
7-5137-229	Sapphire Blue	$2.90	7-5127-235 Hot Pink Scuff	$2.90
7-5177-229	Purple	$2.90	7-5137-235 Sapphire Blue Scuff	$2.90
			7-5147-235 Sun Gold Scuff	$2.90

WOMEN'S BOOTS

7-0500-471	$14.90
7-0560-471	$14.90

Both of these ads will be run in the LOS ANGELES TIMES on THANKSGIVING DAY, November 27th in the "View Section". New ads will be sent to you in a few days.

Thursday, December 4th thru Sunday, December 7th

"AUSSIE BOOTS"
Family Wallaby Promotion

"SUPER NATURAL"
Earth Shoe Promotion

DO YOUR THING - HAVE IT YOUR WAY

MEN'S

7-1203-476	$12.90	7-1203-262	$12.90
7-1213-476	$12.90	7-1203-462	$12.90
7-1213-478	$12.90	7-1213-262	$12.90
7-1263-476	$12.90	7-1213-462	$12.90
7-1263-262	$12.90	7-1263-462	$12.90

BOY'S

7-2603-476	$11.90	7-2603-442	$11.90
7-2613-476	$11.90	7-2610-456	$11.90
7-2663-476	$11.90	7-2663-442	$11.90

All DM-RM OFFICE BUYERS ARE THRU 11/13 MAIL

EXHIBIT D

YOUTH'S

7-3603-220	$10.90	7-3763-242	$10.90
7-3703-220	$10.90	7-3663-242	$10.90
7-3713-220	$10.90	7-3763-220	$10.90
7-3663-220	$10.90		

An ad will be run in the LOS ANGELES TIMES on Thursday, December 4th in the "Main News Section". A new lay-out will be sent to you, showing both the "AUSSIE" and the "SUPER NATURAL" shoe in one ad.

Thursday, December 11th thru Sunday, December 14th

IMPORTANT!
Ad must be run as copy reads. Any changes must have my approval.

WOMEN'S

→ 7-0330-457	$15.99	Fresno, Northwest, and Northern California
7-0360-457	$15.99	Fresno, Northwest, and Northern California
7-0160-862	$14.90	Southern California, Arizona, and Las Vegas
7-01 -629- series	$14.90	Southern California, Arizona, and Las Vegas

MEN'S DRESS

7-1100-073	$12.90	7-1100-130	$12.90	7-1101-108	$12.90
7-1110-073	$12.90	7-1110-130	$12.90	7-1111-108	$12.90

Both of these ads will be run in the LOS ANGELES TIMES on Thursday, December 11th. The Women's ad will be in the "View Section" and the Men's ad on the "Sports Page".

Thursday, December 18th thru Sunday, December 21st

ASPEN

7-1213-221	$9.90
7-1233-221	$9.90

MEN'S DRESS

7-1101-302	$19.90
7-1111-302	$19.90

Both of these ads will be run in the LOS ANGELES TIMES on Thursday, December 18th. The ASPEN will be on the "Sports Page", and the 302 series will be in the "Main News". A new lay-out will be sent to you in time for the ad.

Sunday, December 21st

"YEAR - END SALE AD"

An ad will be run on Sunday, December 21st in the LOS ANGELES TIMES in the "View Section", however, the "YEAR-END SALE" will start on Thursday, December 18th.

MR/er

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SCOA INDUSTRIES INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.,	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

NOTICE OF TAKING DEPOSITION
AND REQUEST FOR DOCUMENTS

To: Marvin C. Soffen, Esq.
Ostrolenk, Faber, Gerb & Soffen
260 Madison Avenue
New York, New York 10016

Attorneys for Plaintiff

PLEASE TAKE NOTICE that, pursuant to the Federal Rules of Civil Procedure, defendant will take the deposition of Milton M. Ross, Operations Manager for the West Coast operations of Gallenkamp's Shoes, a division of SCOA Industries Inc., upon oral examination before an officer authorized by law to administer oaths beginning at 2:00 P.M. on Tuesday, March 16, 1976, at the offices of Fish & Neave, 277 Park Avenue, New York, New York 10017.

Plaintiff is requested to produce at the deposition for inspection and copying by defendant the documents set forth in the attached Schedule A.

The taking of the deposition will be continued from day to day until completed and such adjournments as to time and place will be taken as may be necessary. You are invited to attend and examine the witness.

FISH & NEAVE

By _____
John O. Tramontine
277 Park Avenue
New York, New York 10017
Telephone (212) 826-1050

Attorneys for Defendant.

Schedule A

1. The "Spring and Summer 'MATS' Service" or "catalogue" referred to in paragraph 6 of the affidavit of Larry Anderson.

2. The "pre-printed text accompanying the MATS advertisement" referred to in paragraph 6 of the affidavit of Larry Anderson.

3. All written communications to or from The Visalia Times Delta or personnel of that newspaper (including without limitation Paul R. Cislini) relating to the Gallenkamp advertisement of January 22, 1976, including without limitation invoices and payments, credits and refunds for the same.

4. All advertisements, slicks and accompanying texts for advertisements and memoranda, letters and other documents regarding the advertisement and promotion of plaintiff, including without limitation its Retail Footwear Division, Gallenkamp Shoe Stores, Schiff Shoe Stores, and Conventional and Discount Shoe Departments, relating to the shoes of the type referred to as "ripple" in the affidavit of Larry Anderson or as "Wavy Bottom" in the affidavit of Milt Ross.

5. All advertisements, slicks and accompanying texts for advertisements and memoranda, letters and other documents regarding the advertisement and promotion of plaintiff, including without limitation its Retail Footwear Division, Gallenkamp Shoe Stores, Schiff Shoe Stores, and Conventional and Discount Shoe Departments, which mention or refer to "Get There" or Famolare.

6. Each of the "prior memoranda from Milt Ross" referred to in paragraph 9 of the affidavit of Larry Anderson.

7. The "contact" between Abe Thall and the general managers of the Retail Footwear Operating Subsdivisions referred to in the affidavit of Abe Thall.

8. The "advertising 'slick' together with accompanying text prepared by the Advertising Department of SCOA Industries" referred to in the third sentence of the third paragraph of the affidavit of Milt Ross.

9. The "instructions from the Advertising Department" referred to in the fourth sentence of the third paragraph of the affidavit of Milt Ross.

10. The advertisement originally scheduled to run in December 1975, referred to in the seventh paragraph of the affidavit of Milt Ross, and the slick and accompanying text for that advertisement and all memoranda, letters and other documents regarding that advertisement.

11. The "lay-out" referred to in the first paragraph of Exhibit A of the affidavit of Milt Ross.

12. The "ad scheduled for Thursday, January 22, 1976", referred to in the second paragraph of Exhibit A of the affidavit of Milt Ross, and the slick and accompanying text for that ad and all memoranda, letters and other documents regarding that ad.

13. The promotion that actually ran on Thursday, January 22, 1976, as contemplated by the third paragraph of Exhibit A of the affidavit of Milt Ross, including all advertisements, all slicks and accompanying texts and all memoranda, letters and other documents relating to that promotion.

14. All communications received from Campbell Soup Company or its attorneys prior to June 3, 1975 (including without limitation memoranda of telephone calls) relating to the "conflict" referred to in Exhibit B of the affidavit of Milt Ross.

15. All "Calendar of Events" or communications of the type attached as Exhibit D to the affidavit of Milt Ross for the months (other than December 1975) during which plaintiff (as defined in paragraph 4 of this Schedule A) has offered for sale shoes of the type referred to as "ripple" in the Anderson

affidavit or "Wavy Bottom" the Ross affidavit.

16. The two ads referred to on the second page of Exhibit D of the Ross affidavit under the heading "Thursday, December 11th thru Sunday, December 14th", and the slicks and accompanying texts for those ads and all memoranda, letters and other documents regarding those ads.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SCOA INDUSTRIES INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.,	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

NOTICE OF TAKING DEPOSITION
AND REQUEST FOR DOCUMENTS

To: Marvin C. Soffen, Esq.
Ostrolenk, Faber, Gerb & Soffen
260 Madison Avenue
New York, New York 10016

Attorneys for Plaintiff

PLEASE TAKE NOTICE that, pursuant to the Federal Rules of Civil Procedure, defendant will take the deposition of Larry Anderson, store managerof Gallenkamp's store at 2129 South Mooney Boulevard, Visalia, California, a retail outlet of SCOA Industries Inc., upon oral examination before an officer authorized by law to administer oaths beginning at 10:00 A.M. on Wednesday, March 17, 1976, at the offices of Fish & Neave, 277 Park Avenue, New York, New York 10017.

Plaintiff is requested to produce at the deposition for inspection and copying by defendant the documents set forth in the attached Schedule A.

The taking of the deposition will be continued from day to day until completed and such adjournments as to time and place will be taken as may be necessary. You are invited to attend and examine the witness.

FISH & NEAVE

By _____
John O. Tramontine
277 Park Avenue
New York, New York 10017
Telephone (212) 826-1050

Attorneys for Defendant

Schedule A

1. The "Spring and Summer 'MATS' Service" or "catalogue" referred to in paragraph 6 of the affidavit of Larry Anderson.

2. The "pre-printed text accompanying the MATS advertisement" referred to in paragraph 6 of the affidavit of Larry Anderson.

3. All written communications to or from The Visalia Times Delta or personnel of that newspaper (including without limitation Paul R. Cislini) relating to the Gallenkamp advertisement of January 22, 1976, including without limitation invoices and payments, credits and refunds for the same.

4. All advertisements, slicks and accompanying texts for advertisements and memoranda, letters and other documents regarding the advertisement and promotion of plaintiff, including without limitation its Retail Footwear Division, Gallenkamp Shoe Stores, Schiff Shoe Stores, and Conventional and Discount Shoe Departments, relating to the shoes of the type referred to as "ripple" in the affidavit of Larry Anderson or as "Wavy Bottom" in the affidavit of Milt Ross.

5. All advertisements, slicks and accompanying texts for advertisements and memoranda, letters and other documents regarding the advertisement and promotion of plaintiff, including without limitation its Retail Footwear Division, Gallenkamp Shoe Stores, Schiff Shoe Stores, and Conventional and Discount Shoe Departments, which mention or refer to "Get There" or Famolare.

6. Each of the "prior memoranda from Milt Ross" referred to in paragraph 9 of the affidavit of Larry Anderson.

7. The "contact" between Abe Thall and the general managers of the Retail Footwear Operating Subsdivisions referred to in the affidavit of Abe Thall.

8. The "advertising 'slick' together with accompanying text prepared by the Advertising Department of SCOA Industries" referred to in the third sentence of the third paragraph of the affidavit of Milt Ross.

9. The "instructions from the Advertising Department" referred to in the fourth sentence of the third paragraph of the affidavit of Milt Ross.

10. The advertisement originally scheduled to run in December 1975, referred to in the seventh paragraph of the affidavit of Milt Ross, and the slick and accompanying text for that advertisement and all memoranda, letters and other documents regarding that advertisement.

11. The "lay-out" referred to in the first paragraph of Exhibit A of the affidavit of Milt Ross.

12. The "ad scheduled for Thursday, January 22, 1976", referred to in the second paragraph of Exhibit A of the affidavit of Milt Ross, and the slick and accompanying text for that ad and all memoranda, letters and other documents regarding that ad.

13. The promotion that actually ran on Thursday, January 22, 1976, as contemplated by the third paragraph of Exhibit A of the affidavit of Milt Ross, including all advertisements, all slicks and accompanying texts and all memoranda, letters and other documents relating to that promotion.

14. All communications received from Campbell Soup Company or its attorneys prior to June 3, 1975 (including without limitation memoranda of telephone calls) relating to the "conflict" referred to in Exhibit B of the affidavit of Milt Ross.

15. All "Calendar of Events" or communications of the type attached as Exhibit D to the affidavit of Milt Ross for the months (other than December 1975) during which plaintiff (as defined in paragraph 4 of this Schedule A) has offered for sale shoes of the type referred to as "ripple" in the Anderson

affidavit or "Wavy Bottom" in the Ross affidavit.

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IN THE UNITED STATES DISTRICT COURT
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SCOA INDUSTRIES INC.,	:	
Plaintiff,	:	
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NOTICE OF TAKING DEPOSITION
AND REQUEST FOR DOCUMENTS

To: Marvin C. Soffen, Esq.
Ostrolenk, Faber, Gerb & Soffen
260 Madison Avenue
New York, New York 10016

Attorneys for Plaintiff

PLEASE TAKE NOTICE that, pursuant to the Federal Rules of Civil Procedure, defendant will take the deposition of Abe Thall, Manager of Advertising, Sales Promotion And Display for Corporations of America, the Retail Footwear Division of SCOA Industries Inc., upon oral examination before an officer authorized by law to administer oaths beginning at 10:00 A.M. on Tuesday, March 16, 1976, at the offices of Fish & Neave, 277 Park Avenue, New York, New York 10017.

Plaintiff is requested to produce at the deposition for inspection and copying by defendant the documents set forth in the attached Schedule A.

The taking of the deposition will be continued from day to day until completed and such adjournments as to time and place will be taken as may be necessary. You are invited to attend and examine the witness.

FISH & NEAVE

By John O. Tramontine
John O. Tramontine
277 Park Avenue
New York, New York 10017
Telephone (212) 826-1050

Attorneys for Defendant

Schedule A

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2. The "pre-printed text accompanying the MATS advertisement" referred to in paragraph 6 of the affidavit of Larry Anderson.

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4. All advertisements, slicks and accompanying texts for advertisements and memoranda, letters and other documents regarding the advertisement and promotion of plaintiff, including without limitation its Retail Footwear Division, Gallenkamp Shoe Stores, Schiff Shoe Stores, and Conventional and Discount Shoe Departments, relating to the shoes of the type referred to as "ripple" in the affidavit of Larry Anderson or as "Wavy Bottom" in the affidavit of Milt Ross.

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11. The "lay-out" referred to in the first paragraph of Exhibit A of the affidavit of Milt Ross.

12. The "ad scheduled for Thursday, January 22, 1976", referred to in the second paragraph of Exhibit A of the affidavit of Milt Ross, and the slick and accompanying text for that ad and all memoranda, letters and other documents regarding that ad.

13. The promotion that actually ran on Thursday, January 22, 1976, as contemplated by the third paragraph of Exhibit A of the affidavit of Milt Ross, including all advertisements, all slicks and accompanying texts and all memoranda, letters and other documents relating to that promotion.

14. All communications received from Campbell Soup Company or its attorneys prior to June 3, 1975 (including without limitation memoranda of telephone calls) relating to the "conflict" referred to in Exhibit B of the affidavit of Milt Ross.

15. All "Calendar of Events" or communications of the type attached as Exhibit D to the affidavit of Milt Ross for the months (other than December 1975) during which plaintiff (as defined in paragraph 4 of this Schedule A) has offered for sale shoes of the type referred to as "ripple" in the Anderson

affidavit or "Wavy Bottom" in the Ross affidavit.

16. The two ads referred to on the second page of Exhibit D of the Ross affidavit under the heading "Thursday, December 11th thru Sunday, December 14th", and the slicks and accompanying texts for those ads and all memoranda, letters and other documents regarding those ads.

mcjb

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

SCOA INDUSTRIES, INC.,

Plaintiff,

V. 75 Civ. 3357

FAMOLARE, INC.,

Defendant.

----------x

March 26, 1976
5:30 p.m.

BEFORE:

HON. INZER B. WYATT,

District Judge.

A P P E A R A N C E S:

OSTROLENK, FABER, GERB & SOFFEN, ESQS.
Attorneys for plaintiff,
MARVIN C. SOFFEN, ESQ.,
Of Counsel

-and-

DOWELL & DOWELL, ESQS.
A. YATES DOWELL, JR., ESQ.,
Of Counsel

FISH & NEAVE, ESQS.
Attorneys for defendant,
JOHN O. TRAMONTINE, ESQ.,
Of Counsel

MR. TRAMONTINE: May I proceed, your Honor? My name is John O. Tramontine and I am appearing for the defendant, Famolare, the moving party.

Your Honor, there are two motions before your Honor. One is for a preliminary injunction to restrain infringement of defendant Famolare's trade mark "Get There" which applies to shoes. The other motion is for leave to file two supplemental counterclaims.

The first counterclaim, which is not opposed, is a counterclaim for an infringement of a utility patent that has issued since the filing of the original complaint and in our contention in our complaint is directed to the same shoes that are being sold by Scoa.

The second counterclaim is for infringement of that "Get There" trade mark.

Your Honor, the hour is late and with the Court's permission I would like to call a witness.

THE COURT: All right.

MR. SOFFEN: May I say something at this point?

THE COURT: Yes.

MR. SOFFEN: It was only yesterday afternoon that I was advised as to the name of this witness. I was given some general statement by Mr. Tramontine as to what the subject matter of this testimony was going to be.

It seems that it does not relate to anything that is in the papers. The issue here is very simple: Whether the one-time publication of a small ad with words "Get There" appears entitles defendant to this preliminary injunction.

As I stated, this witness is going to go into some other area to the effect that some store of our client in California was passing off.

I just have no opportunity for rebuttal at this point, depending on what this witness says, and I don't think that the testimony relates to papers that are already on file. I would ask leave at least to have some rebuttal at sometime.

THE COURT: You have to take it as soon as this witness is finished.

MR. SOFFEN: The rebuttal can be only by someone who is in California. All these acts took place in California.

THE COURT: There is a limit as to how much time I can spend on it. Unfortunately the days have long passed when we can do this in an orderly, human, decent fashion. That is ancient history.

MR. SOFFEN: I understand, but it was impossible to get someone here in the time given. I only got the

witness' name yesterday.

MR. TRAMONTINE: I was never asked if I had any witness until yesterday and I told him.

MR. SOFFEN: We never got a reply brief that insisted on an evidentiary hearing before.

MR. TRAMONTINE: I informed you of that before that.

THE COURT: I'm sorry. I've got to get finished with this.

MR. SOFFEN: It is physically impossible to fly a witness in from California in this time for rebuttal.

THE COURT: Too bad.

MR. TRAMONTINE: May I proceed, your Honor?

THE COURT: Yes.

MR. TRAMONTINE: The defendant calls Paula Shepherd.

P A U L A S H E P H E R D, called as a witness in behalf of the defendant, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. TRAMONTINE:

THE COURT: Will this be the only witness?

MR. TRAMONTINE: Yes, unfortunately, Your Honor.

THE COURT: Is there documentary evidence?

MR. TRAMONTINE: Yes, your Honor, there is documentary evidence with the witness and I have other documentary evidence to offer.

THE COURT: All right, go ahead. We'll deem your exhibits as having been marked. You can go on. I have to let my courtroom deputy clerk go. He goes to New Jersey and the hour is getting late.

MR. TRAMONTINE: Sure.

Q Mrs. Shepherd, where do you reside?

A 906 Divisadero, Visalia, California.

MR. TRAMONTINE: Visalia, California is the place where the advertisement was published.

THE COURT: What is the name of your town?

THE WITNESS: Visalia, V-i-s-a-l-i-a.

THE COURT: Tell me, where is it?

THE WITNESS: Between Bakersfield and Fresno, right in the middle. It's in the San Joaquin Valley.

THE COURT: Would that be near Sacramento?

THE WITNESS: Sacramento, then Fresno and then Visalia.

THE COURT: Coming south?

THE WITNESS: Yes.

THE COURT: All right, I have a general idea of where it is.

Q How old are you, Mrs. Shepherd?

A 23.

Q Who are you employed by?

A Dick Parker Shoes.

Q Is that in Visalia, California?

A Yes.

Q What is your position with them?

A I'm assistant bookkeeper and I also do sales work.

Q How long have you been employed by Dick Parker Shoes?

A Nine months.

Q Does the Dick Parker shoe stores handle the Famolare "Get There" shoes?

A Yes, they do.

Q During the period from the 1st of this year until the present time have you done sales work for those stores?

A Yes, I have.

Q And do or do not the majority of the people who come into the store and purchase "Get There" shoes ask for them by the name "Get There" or do they ask for them in some other fashion?

A They ask for them by their name, "Get There".

Q What kind of seller is the Famolare "Get There"

shoe in the Dick Parker shoe stores?

A It is our best seller.

Q Is Dick Parker the owner of those stores?

A Yes, he is.

Q Since the 1st of the year did you have a conversation with Mr. Parker, your boss, with regard to the Gallenkamp shoe store in Visalia?

A Yes, I did.

MR. TRAMONTINE: Your Honor, Gallenkamp is a division of the plaintiff Scoa.

Q Would you tell the Court the substance of the discussion that you had with Mr. Parker?

A Mr. Parker asked me to go to the Gallenkamp store and see if there was any kind of advertisement, any pictures or anything that had the words "Get There" on it and to purchase a pair of shoes that would be in appearance like the "Get There" shoe but not to say the "Get There" shoe. To ask the salesman about the shoe and to try to purchase it.

Q When did this conversation take place with Mr. Parker?

A February 5th or 6th.

Q 1976?

A 1976.

Q Did you in fact go to the Gallenkamp shoe store in Visalia?

A Yes, I did.

Q When did you go there?

A Friday, February 6, 1976.

Q Did you go by yourself?

A No, I took my girl friend, Melinda Morris.

Q Did you see any sign or poster or anything printed with the words "Get There" on it?

A No advertisement.

Q Would you tell the Court what happened when you went into the store?

A I asked a salesman if I could purchase a shoe with the wavy sole that was in the window and I pointed to it and I said, "What is the name of that shoe?"

And he said to me, "The 'Get There,'" and I said, "Yes," and I asked him if I could try a pair on.

He brought out the pair. I tried a pair on. I told him I would buy them. I asked him again what the name of the shoe was. He said, "Get There."

We went up -- I paid for the shoe. I asked him if he could write the name of the shoe down so I wouldn't forget it and he wrote it on the box.

MR. TRAMONTINE: I ask that a box, the yellow

box with the name Gallenkamp printed on it be marked as Defendant's Exhibit A for identification.

(Defendant's Exhibit A deemed marked for identification.)

Q Mrs. Shepherd, can you identify that box?

A Yes.

Q Is that the box of the shoes that you had purchased at the Gallenkamp store?

A Yes, it is.

MR. TRAMONTINE: Your Honor, I would ask that the right shoe contained in that box be marked as Defendant's Exhibit B for identification.

THE COURT: All right, B for identification.

(Defendant's Exhibit B deemed marked for identification.)

MR. TRAMONTINE: I offer the box and the two shoes, one of which has been marked B for identification in evidence.

THE COURT: Show them to counsel.

MR. SOFFEN: I want the record to show that "Get There" is spelled G-e-t T-h-e-r-e.

MR. TRAMONTINE: I take it there is no objection.

MR. SOFFEN: Except for the objection I stated earlier about this.

THE COURT: All right, without objection it will be received.

(Defendant's Exhibits A and B received in evidence.)

THE COURT: May I see them?

Is that your handwriting?

THE WITNESS: No, it is the sales clerk.

THE COURT: It is he handwriting of the sales clerk. I see.

There is no "Get There" on the shoes or the box.

MR. TRAMONTINE: That is correct, your Honor.

THE COURT: All right.

MR. TRAMONTINE: The witness' testimony was that the salesman identified them as "Get There" shoes.

THE COURT: I understand.

(Continued on next page.)

Q Mrs. Shepherd, there looks like an erasure on the word get, and the word "their" is spelled "t-h-e-i-r." Can you explain the erasure?

A Yes, he didn't know how to spell it. He started to spell it once, erased it and said, "That's okay, I just would like you to put the word down," and he spelled it incorrectly.

MR. TRAMONTINE: I ask that a receipt apparently dated February 6th be marked for identification as Defendant's Exhibit C.

(Defendant's Exhibit C marked for identification.)

Q Mrs. Shepherd, can you identify that receipt?

A Yes.

Q Is that the receipt you received at the Gallenkamp store when you purchased the shoes?

A It is.

MR. TRAMONTINE: Offer if in evidence, your Honor.

THE COURT: All right. Show it to counsel.

MR. SOFFEN: No objection.

THE COURT: Without objection it will be received. Now what exhibit is this?

MR. TRAMONTINE: That is Exhibit C.

THE COURT: And what is its description?

MR. TRAMONTINE: It is a receipt.

THE COURT: All right.

MR. TRAMONTINE: For the pair of shoes the witness purchased.

THE COURT: All right, let me take a look at it.

MR. TRAMONTINE: On the back side, your Honor, which is difficult to see, if you look from the other side, it is Gallenkamp's.

THE COURT: All right. Go ahead.

(Defendant's Exhibit C received in evidence.)

Q Would you describe the salesman, please?

A The salesman was young, I'd say between 22 and 26, probably, and had dark hair.

Q Did you get his name?

A No. His number is on the receipt.

Q Now, the pair of shoes inside the box, which you purchased, on the innersole it says, "Right-On" by Gallenkamp. Did the salesman mention to you anything, that word "Right-On"?

A No.

Q Did you see, before you purchased the shoes, the word "Right-On"?

A No.

Q Did you try the shoes on before you purchased them?

A Yes.

Q When was the first time that you noticed the words "Right-On" on the inside of the shoe?

A After I purchased the shoes and left the store, I took them out of the box and looked at them.

Q Did you pay for the shoes yourself or did Mr. Parker give you money to pay for them?

A Mr. Parker gave me the money.

Q At any time, when you were in the store, did either you or your personal friend, Miss Morris, mention the word "Get There"?

A No, we didn't.

Q When you tried the Gallenkamp shoe on, how did it feel to you?

A Not comfortable.

Q Had you worn Famolare "Get There" shoes yourself before?

A Yes, I have two pair.

Q And how did they compare in comfort and in construction?

A Very poorly compared to the "Get There" shoe. The "Get There" shoe is very comfortable, and it is a very good shoe for your foot, and this shoe definitely is not the same as the "Get There."

Q Is there any difference in construction between the Famolare shoe --

MR. SOFFEN: Your Honor, I object, because I don't think this witness is qualified as an expert on the structure of shoes.

MR. TRAMOTINE: Your Honor, she sells shoes.

MR. SOFFEN: It may be one personal reaction. I don't know what that means.

THE COURT: I will treat it as going to the weight. As long as she is here we might as well take her testimony.

Q In terms of materials of construction, is there any difference between Famolare shoes and the Gallenkamp shoe you purchased?

A The "Get There" shoe is leather, and this shoe is vinyl.

Q How do they compare in price?

A The "Get There" shoes are twice as much as these. These sell for about 15.99 and our shoes are between 30 and 32.

Q Do you have any information as to the price or cost to Dick Parker shoes to buy the Famolare shoes?

A We pay at cost 15, maybe 15.75, at cost.

MR. TRAMOTINE: I ask that a Famolare "Get There" right shoe be marked as Defendant's Exhibit D.

THE COURT: All right, Exhibit D, let's deem it marked, that is the Famolare shoe. Show it to counsel.

(Defendant's Exhibit D marked for identification.)

Q Mrs. Sheperd, is that shoe sold by Dick Parker Shoe Company?

A Yes, it is.

MR. TRAMOTINE: Offer it, your Honor, in evidence.

THE COURT: All right, show it to counsel.

THE COURT: Any objection?

MR. SOFFEN: No objection.

THE COURT: All right, we'll deem it marked. Let me take a look at it.

MR. TRAMOTINE: Yes, your Honor.

THE COURT: Deemed marked Defendant's Exhibit D in evidence.

MR. TRAMOTINE: Your Honor, there is the Famolare shoe, and this is the Scoa Gallenkamp shoe.

THE COURT: All right.

MR. TRAMOTINE: I have no further questions, your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. SOFFEN:

Q I believe you testified that the Gallenkamp store had no written advertising using the word "Get There," is that correct?

A Not in this store.

Q Did you ever see the word "Get There" used on any of the boxes in that store?

A No.

Q Or any display ads on the windows or anywhere else?

A I saw it in the ad in the newspaper but nowhere else.

Q You are speaking of the ad in the Visalia Times of January 22nd?

A I'm not sure of the date.

Q Did you see it on more than one occasion in the newspaper or only once?

A I saw it just once.

Q You said you didn't know the salesman's name, was that your testimony?

A Right. I don't know his name.

Q Do you know any of the salesmen in that store?

A No.

Q Do you know a Mr. Ernest Corinado, Corinado?

A Not that I recall.

Q Where did you work before you were working at the Parker store?

A L. E. Cooke Company, it's a nursery.

Q Did you ever work at J. C. Penny?

A Yes, I did.

Q Did you sell shoes there?

A Yes, and I know an Ernie from there.

Q You know Mr. Corinado from there?

A I didn't know his last name.

Q Right. Do you know that Ernie is also a salesman in the Gallenkamp store now?

A I knew he had been. I didn't see him that day when I went in.

Q How many times did you go in that day?

A Pardon?

Q How many times did you enter the store that day?

A I went in and made a phone call to Mr. Parker, I left the store, and then I proceeded right back in twice, in a matter of ten minutes.

Q You didn't ask for Ernie when you were there?

A No, I didn't ask for anybody.

Q You knew he worked there?

A I didn't know he worked there then, no.

Q When did you know that?

A Oh, about maybe a year and a half ago I saw him.

Q A year and a half ago?

A A year. I don't remember. I saw him a long time ago in there.

Q Working there?

A Yes.

Q Oh, you knew he was there as of a year and a half ago, is that it?

A I remember going in there about a year and a half ago and I saw him. That was the last time I saw him.

Q And you didn't see him on the first trip into the store, is that your testimony?

A Right. I didn't see him.

Q Did you buy anything on your first trip into the store?

A No.

Q And when did you come back after you went out of the store?

A I said I entered the store twice in a matter of ten minutes.

Q Did you see Ernie at all the second time in the store?

A Not that I recall.

Q Did you know the salesman at all that waited on you?

A No.

Q I believe you described him as young, was he? Could you describe him a bit more for us? I'm not sure I got it on your direct.

A I said I thought he was probably between the age of 22 and 26, and he had dark hair.

Q Was he Hispanic at all as far as you could tell?

A I recall him being slightly dark.

Q When you went in and asked for the shoe, what words did you use?

A I asked the salesman if I could purchase or see a shoe, the shoe with the wavy sole and I pointed to the one in the window.

Q You did not ask for the "Get There" shoe?

A No, I did not.

(Continued on next page.)

Q I believe you said you asked the salesman to put the words down on the box?

A I asked him if he would write the name of the shoe down for me so I wouldn't forget it and I thought he might put it on the receipt, but he wrote it on the box.

Q Is that the only reason you gave?

A Yes.

Q You didn't give him a reason that you wanted the name on it so you would know what to look for?

A Possibly I told him. The main thing is that I wanted to know the name so I wouldn't forget it if I need further reference for the shoe.

Q And he didn't even spell "There" correctly, did he?

A No, he did not.

Q Did you tell him how to spell the word?

A No, I did not.

Q You took his misspelling as it was?

A He said he did not know how to spell it. I said, "Just spell it the way you want to."

Q As far as you know, this man who waited on you was a young salesman. You don't know that he had any other capacity in the store?

A No.

Q When you received the box with the writing on it, what did you do with it? After you purchased the shoes, what did you do?

A Well, I took it home and the next -- when I went back into the office I gave it to my boss, Mr. Parker.

Q That was on what date?

A The 7th.

Q The 7th of February?

A Yes.

Q And what did Mr. Parker say when you gave it to him?

A I told him my conversation with the sales clerk. I gave him the change back from the money he had given me. He said he was going to take the box and mail it to Famolare.

Q Did he say why he was going to mail it to Famolare?

A We had discussed it. The reason that I bought the shoe was because they were using the words "Get There."

Q Who was using it?

A It had been used in a newspaper ad.

Q I had been used in the one newspaper ad you testified to?

A Yes, the one newspaper ad.

Q And Mr. Parker is a competitor of the Gallenkamp shoe store, is he not?

A I wouldn't really call him a competitor. For this shoe right now we are.

Q Can you explain the erasure on the box?

A Yes. When I went up to the counter he started to write the word. He said he did not know how to spell it. He erased it. I said, "Go ahead and spell it the way that you want to," and he continued a second time to write the words "Get Their."

Q You say you gave the box and the shoes to Mr. Parker?

A Yes, I did.

Q And you said he then mailed it to Famolare or sent it to Famolare. Do you know what happened to it after that?

A I presume that Mr. Tramontine got it.

Q When did you see the box next after the time you gave it to Mr. Parker?

A Today.

Q Today is the first time you have seen it since February 7th, isn't it?

A That is correct. Well, it wasn't mailed on February 7th, but this is the first time I have seen it

since February.

Q When were you first asked to testify in this proceeding?

A I don't remember the exact date.

Q Was it more than a week ago?

A Yes.

Q More than two weeks ago?

A Possibly two weeks, maybe three weeks ago.

Q Was your girl friend with you both times that you were in the store or only the first time?

A The first time, when I went in, I just walked through. I went to the pay phone and went back. She was with me the whole time.

Q I'm sorry. You went to the pay phone outside?

A Outside the Gallenkamp store in the mall, and she was with me the whole time.

Q Were there any salesmen in the store at the time besides the one who waited on you?

A I'm sure -- yes, I'm sure there were.

Q Can you describe them?

A No, I could not.

Q Did you know that any of them were aware of the transaction that you had with this salesman?

A No.

Q Did the salesman that sold you the shoe take your money?

A I don't know either. No. I don't think so. I'm not sure. I know that the salesman that showed me the shoe and gave it to me and called it a "Get There," he's the one that wrote it on the box, but I don't know who took the money.

Q When did he put the writing on the box?

A When I was purchasing the shoe.

Q After you paid for it?

A During.

Q While you were paying for it. What did you do? You took the shoe and walked over to a cashier or a counter or what?

A Yes, I walked over to the counter to pay for it.

Q And you paid someone else?

A I don't remember. I don't know if I paid the same gentleman that showed me the shoe or not.

Q He wrote the words on the box at your request at the time you were paying for the shoes?

A I didn't ask him to write it on the box, but I did ask him to write the words down, yes.

Q The salesmen in the store don't use name tags or anything, do they, or buttons?

A In Gallenkamp?

Q Yes, in Gallenkamp.

A I don't know.

Q But you don't know the salesman's name?

A No.

Q Did you say anything to the salesman about the fact that Ernie had worked there at one time?

A No, I did not. He never entered my mind.

Q Did you ever go at any other time into the Gallenkamp store in Visalia to purchase shoes since that time?

A Since that time?

Q Yes.

A No.

Q Had you ever gone there before that time to purchase shoes?

A Maybe two years ago. Maybe a year ago. It has been a long time.

Q Was that, when you went there, also at the direction of Mr. Parker?

A No, it was not. It was for myself.

MR. SOFFEN: I have no further questions.

THE COURT: Anything else?

MR. TRAMONTINE: I have no further questions.

THE COURT: You may step down.

(Witness excused.)

MR. SOFFEN: Your Honor, may I just say something? I do want to comment briefly, if I might, that this testimony because of the fact -- to the extent that this is really relevant to the issue here, we would like an opportunity to find this salesman who I believe can present testimony.

(Continued on next page.)

MR. TRAMONTINE: Your Honor, may I address myself to that?

Mr. Soffen submitted a series of affidavits, one by their store manager, one by their regional manager, one by their national manager.

I asked counsel to produce those witnesses here today to be examined before you.

He refused. He said, "You can take their d-epositions in California or Ohio."

They refused to be here, and he could have had the store manager here, and now he wants witnesses.

MR. SOFFEN: No, they could have been here, but they couldn't have helped me here. I would have had all these people here from California except evidently their salesman who we're concerned with, his testimony, so we would have gone through the whole expense of having the wrong people here.

It wasn't the store manager who waited on her. It was some salesman who couldn't spell properly.

MR. TRAMONTINE: Your Honor, may I proceed?

THE COURT: Yes.

MR. TRAMONTINE: Your Honor, the witness referred to a personal friend that accompanied her, Melinda Morris, and we have the affidavit of Miss Morris

that goes to the same incident, which we would ask to be marked as Defendant's Exhibit E for identification.

THE COURT: Well, we don't have to mark it as an exhibit. It will just be part of the file.

MR. TRAMONTINE: Your Honor, that does raise a problem that I have. And the Court, I'm sure, is aware that on a motion it can consider affidavits or direct a hearing.

The issues here are directed, I think, in large measure, to credibility.

Now, the reason I made an offer in evidence of these affidavits was to find out if counsel for Scoa wanted to cross-examine witnesses.

I personally want to cross-examine the people who are identified as managers on their credibility, and I would object in the absence of an opportunity to cross-examine those people to the Court's consideration of their affidavits.

MR. SOFFEN: Your Honor, he has had three weeks to cross-examine these witnesses. He noticed their depositions, and then adjourned them without taking them. He had every opportunity to cross-examine these people.

MR. TRAMONTINE: There is a stipulation, your

Honor, where both parties agreed they were adjourned because it was impossible for Scoa to produce the docume that I asked for in aid of those depositions until the 22nd.

MR. SOFFEN: At that point, there was still plenty of opportunity; he could have gone to where the documents were and examined the witnesses.

THE COURT: In any event, we started talking about whether it should be an exhibit, given an exhibit number, or should be simply made a part of the record.

If you want to give it an exhibit number, it's all right with me.

MR. TRAMONTINE: Thank you, your Honor.

MR. SOFFEN: I am just going to interpose my objection, without any opportunity for rebuttal to this last submitted affidavit.

THE COURT: All right, I will receive it.

Whose affidavit is it?

MR. TRAMONTINE: The affidavit of Melinda Morris.

(Defendant's Exhibit E deemed marked in evide

THE COURT: What else?

MR. TRAMONTINE: Just for the sake of the record, I would like to offer --

MR. SOFFEN: May I have a copy of the affidavit?

MR. TRAMONTINE: Certainly.

I would like to offer in evidence the affidavit of Carl C. Conway, the affidavit of Paul R. Cizlini, and the affidavit of Richard R. Parker, copies of which have previously been served upon counsel for Scoa.

I offer those as Exhbits F, G and H respectively.

MR. SOFFEN: I believe these affidavits are part of the record already, your Honor.

THE COURT: I thought they were, too, but if he wants to mark them, he may.

MR. SOFFEN: I just object that they are being duplicative of the record. I am not prepared to st-art reoffering our affidavits.

MR. TRAMONTINE: To make myself obviously clear, if counsel wishes to cross-examine any of the witnesses here, and he wants to object to their admissibility in evidence on that ground, he can say so.

Now, I will call Mr. Conway, if necessary, if he objects to the use of these affidavits.

MR. SOFFEN: How about Mr. Cizlini? Will you call him?

MR. TRAMONTINE: He is not in my control, and I willwithdraw his affidavit if you object to it on the

grounds of lack of opportunity to cross-examine.

MR. SOFFEN: How about Mr. Parker?

MR. TRAMONTINE: Mr. Parker is not in my control, and if you object to it on the ground of lack of opportunity to cross-examine, I will withdraw it.

MR. SOFFEN: Well, your Honor, as far as I am concerned, all the affidavits can go in, but I don't want this. I think what the counsel is trying to do is make this some sort of one-way street.

THE COURT: No, if you want to submit affidavits, I will take your affidavits. In fact, you have already submitted --

MR. SOFFEN: Yes, I have. Thank you.

THE COURT: All right. "E" was the Morris affidavit. What is "F"?

MR. TRAMONTINE: Conway is the "F" affidavit. "G" is a second affidavit submitted from the same person; the first affidavit was submitted by Scoa. It's the Cizlini affidavit.

THE COURT: "G" is Cizlini?

MR. TRAMONTINE: That's correct, your Honor, and "H" is Parker.

THE COURT: All right.

(Defendant's Exhibits F, G and H deemed marked

in evidence.)

THE COURT: What else?

MR. TRAMONTINE: Your Honor, I ask that an invoice of the Visalia Times Delta to the Gallenkamp Shoe Corp. be marked as Defendant's Exhibit I. This document was produced to us by counsel for Scoa within the last -- this week.

I offer it in evidence, your Honor.

THE COURT: All right. How do you describe it, an invoice?

MR. TRAMONTINE: It's an invoice from the newspaper, the Visalie Times Delta, to Gallenkamp Shoe Corp.

THE COURT: All right.

MR. TRAMONTINE: I understand that attached to this but not produced to us was a copy of the advertisment showing the "Get-There" sole.

Is that correct, counsel?

MR. SOFFEN: Excuse me. Where it says, "Tear sheet," the tear sheet would be of the advertisement.

MR. TRAMONTINE: And it was attached to this invoice?

MR. SOFFEN: I can't say that one way or

or the other, but that's what the tear sheet usually is.

THE COURT: It is deemed received.

(Defendant's Exhibit I deemed received in evidence.

THE COURT: I haven't got a clerk here to mark them. Next week you can get him to mark it.

MR. TRAMONTINE: I ask to be marked as Defendant's Exhibit J for identification a group of four documents. They are internal documents of Scoa, including internal documents of its various divisions, such as the Norrwock Shoe Division and the Norrwock Shoe Co., and each one of these, your Honor -- and these are internal, they don't go outside the company -- but they refer to the Scoa copy of our product, our shoe, as the "Get-There."

THE COURT: Let me see it.

MR. TRAMONTINE: These documents were produced by counsel for Scoa.

MR. SOFFEN: I am going to object. I don't believe these documents were produced by us.

MR. TRAMONTINE: Your Honor, I represent to the Court that they were. They were produced, except for the red marks, your Honor, which I put on.

MR. SOFFEN: I don't recognize these documents as being produced from us.

MR. TRAMONTINE: Unfortunately, your Honor,

when the documents were produced, they were not given any identification numbers. This is before I came into the case.

I represent to the Court that they were --

THE COURT: They are documents of Scoa, and they are marked as Exhibit J. Let me see them.

MR. SOFFEN: Do you have another copy I could look at?

MR. TRAMONTINE: Surely.

THE COURT: All right.

MR. TRAMONTINE: May it be received, your Honor?

THE COURT: Of course.

(Defendant's Exhibit J deemed received in evidence.)

MR. TRAMONTINE: Your Honor, it is our contention here in moving for this preliminary injunction, that Scoa has followed a course of conduct of using other people's trademarks externally in their promotion and advertising until the owner complains about the use of the trademark on a shoe, and then they just use it internally after that, with the result that happened here of a palming-off of a product under the name of the trademark, even though not used with any sign in the store.

THE COURT: Well, I'm not sure I would call it a palming-off, because she didn't ask for a "Get-There" shoe.

MR. TRAMONTINE: That is true, your Honor. It's worse than palming-off, in a sense.

THE COURT: I'm not sure. Whatever it may be, it's not palming-off.

MR. TRAMONTINE: It's a misrepresentation by use of a trademark. It's clearly the use of a trademark, and it injures my client. It's a cheaper shoe. It's not as comfortable, and that person would never buy another "Get-There" shoe again.

The same pattern of conduct, your Honor, and I have exhibits I would like to offer in evidence here, was followed by the Scoa Company with regard to the "Earth" shoe, and I would like to mark as Defendant's Exhibit K for identification an internal memorandum of Scoa which was produced to us by Scoa, regarding the earth shoe, and also as Defendant's Exhibit L, a registration of the mark of the "Earth" shoe to another company, of neither of the parties here.

THE COURT: All right.

MR. SOFFEN: I object to Exhibit K because the "Earth" shoe isn't an issue in this case. It's

another shoe, it's another matter.

MR. TRAMONTINE: Your Honor, it shows a pattern of conduct.

THE COURT: There is no jury. Let's go on.

MR. TRAMONTINE: May they be received, your Honor?

THE COURT: Of course.

(Defendant's Exhibits K and L received in evidence.)

MR. TRAMONTINE: I would like to have marked as Defendant's Exhibit M for identification another trademark that is used by Scoa, trademark for a shoe, and this is the Wallabee's.

MR. SOFFEN: I object. I just can't see the relevance of this to anything that has been mentioned.

THE COURT: Well, there is no jury. I will take it.

(Defendant's Exhibit M deemed received in evidence.)

MR. TRAMONTINE: I also ask to be marked for identification an internal calendar of events for Gallenkamp Shoe Stores, which in their own internal directions to their stores refers, for example, to "Earth Shoe promotion," in other words, somebody else's

trademark, but calls it "Supernaturally," but then internally continue to use the term "Earth Shoe."

This is after they stopped, they stopped using it externally, but internally they continued to do so.

The same thing was done on Wallabee.

THE COURT: All right. That is Exhibit N, received.

MR. SOFFEN: Same objection. I object to the characterization, but that is argument.

THE COURT: All right.

(Defendant's Exhibit N deemed received in evidence.)

MR. TRAMONTINE: I ask to have marked as Defendant's Exhibit O for identification another document which was produced by Scoa, internal document, and in this document, your Honor, it is a very funny document -- it was after they said they stopped using the word "Earth" and here is an internal document from one of the affiants who gave an affidavit here, say, "Whenever running ads on the 'Earth' type shoe, do not use the word."

I offer that in evidence as Exhibit O.

THE COURT: All right.

MR. SOFFEN: Same statement of relevance, your Honor.

MR. TRAMONTINE: I didn't hear that.

MR. SOFFEN: I said same objection of irrelevance.

THE COURT: I will take it. Overruled.

MR. TRAMONTINE: I would like to direct the Court's attention to the fact that in the complaint -- and the complaint is a complaint of Scoa -- they are seeking relief from this Court that Famolare has no proprietary trademark that is valid, enforceable and infringed by plaintiff Scoa directly or indirectly.

In that connection, attached to my affidavit, which has been served, and which I would like to mark as Exhibit P for identification, is one page from the examination of Mr. Famolare by counsel for Scoa, in which -- and that is at page 113 of his transcript -- in which it is clear that counsel is attempting to show that the word "Get-There" is descriptive, and therefore would mean it would be an invalid trademark.

MR. SOFFEN: Again, I just would note that this affidavit is a duplicate of what is already --

THE COURT: I know. I don't know what we are doing, but if he likes what he is doing --

MR. SOFFEN: It's a duplicate of what's on file already, if he wants to mark it.

THE COURT: All right.

MR. TRAMONTINE: Your Honor, we are at this juncture. I have asked counsel for the other side to produce the people that they gave there, their employees, their managing agents, and they have refused to do so.

I offered to put over this hearing for a week if they would produce them.

THE COURT: No, we are not putting over the hearing for any week.

MR. TRAMONTINE: Your Honor, in view of that, I would ask that the Court not consider the affidavits of those three people who they refused --

THE COURT: No, I will consider them.

All right, what else?

MR. TRAMONTINE: Your Honor, that is all. Thank you, your Honor.

THE COURT: Now, I thought that you referred at somepoint to an advertisement in the Visalia newspaper.

MR. TRAMONTINE: Yes, your Honor.

THE COURT: How is that in evidence?

MR. TRAMONTINE: That is attached to the affidavit of Mr. Conway, and, your Honor, probably to help the Court, let me mark a copy of that advertisement.

THE COURT: What exhibit is that, Mr. Conway's affidavit.

MR. TRAMONTINE: Exhibit Q to the Conway affidavit, your Honor -- I'm sorry, Q is the Conway affidavit.

Let me mark the advertisement separately so the Court can find it readily. That will be Defendant's Exhibit Q.

THE COURT: Well, apparently it's a loose and disjointed procedure. The advertisement is apparently an exhibit to a memorandum of law. I don't know where that leaves us, but I don't care.

MR. TRAMONTINE: I'm sorry, your Honor.

THE COURT: I haven't got time to fool with the details of it.

MR. TRAMONTINE: I would like to mark was Defendant's Exhibit Q the advertisement in question, and I offer it in evidence.

THE COURT: All right.

MR. SOFFEN: No objection.

(Defendant's Exhibits O, P and Q deemed received in evidence.)

MR. TRAMONTINE: That is the advertisement of the Gallenkamp Shoe Store that uses the expression "Get-There Sole."

THE COURT: All right. What is next?

MR. TRAMONTINE: That is all I have, your Honor.

THE COURT: All right. What does Scoa have?

MR. SOFFEN: Your Honor, Scoa relies on the affidavits that we submitted in response to this motion.

I have some argument I would like to present.

THE COURT: All right.

MR. SOFFEN: I have one other document which we did produce, which ought to be added, to complete the record, as an exhibit, and that is a list of the various stores. It shows the scope of advertising of the "Walk On, America," which is an ad relative to this shoe.

THE COURT: All right.

MR. SOFFEN: It's a list of newspapers to which Scoa directs its advertising.

THE COURT: All right.

MR. SOFFEN: It's not the accused ad, by the way

MR. TRAMONTINE: Your Honor, all this appears to be is a list of newspapers and amounts over here, and it says, "December 8, 1975." It's meaningless to me.

THE COURT: I don't care what it is. I will take it. Exhibit 1, and you wil have to get it marked by the clerk next week. That is a list of ads.

MR. TRAMONTINE: I object to it.

MR. SOFFEN: List of ads.

THE COURT: All right.

(Plaintiff's Exhibit 1 received in evidence.)

THE COURT: What else?

MR. SOFFEN: If your Honor please, I'd rather not go through the attachments to our affidavits and remark those, if they are part of the record.

THE COURT: They are part of the record as far as I'm concerned.

MR. SOFFEN: Fine. So I have nothing else then.

THE COURT: All right. Then what have you got to say, because it seems to me I ought to issue a preliminary injunction.

MR. SOFFEN: I have to say this: The advertisement -- first of all, this comes on on an order to show cause, which was brought a month after this one advertisement appeared. This is one single advertisement in a small town in California.

THE COURT: I agree.

MR. SOFFEN: That was put together without company authority by the manager of the Visalia store with the newspaper man. The manager did not tell the

newspaper man to use "Get-There."

THE COURT: I believe he did.

MR. SOFFEN: No, he did not, your Honor.

THE COURT: Well, I find that he did.

MR. SOFFEN: Your Honor, there's nothing in any affidavit and record --

THE COURT: Yes, Cizlini says he did.

MR. SOFFEN: Cizlini only says that he wasn't told, that he doesn't recall being told not to do it. That's what he says.

THE COURT: He says that whatever he put in the ad other than the photographs, he was told to put in by the manager.

MR. SOFFEN: But he says he did not -- well, let me -- Cizlini, first of all, never gave a proof of this to the manager before the ad came out, and Cizlini says --

MR. TRAMONTINE: Exhibit G.

MR. SOFFEN: Cizlini in his affidavit says, "I do not recall Mr. Anderson telling me not to use the name 'Get-There' in the advertisement."

We have affidavits of Anderson and Matoya saying he did tell him that. He doesn't say dispositively that Anderson told him to use it.

MR. TRAMONTINE: Your Honor, that's misleading.

Mr. Cizlini does say, "I am confident that if Mr. Anderson had told me not to use that name, I would not have used it in the advertisement."

And he goes on to say that he prepared that advertisement within not more than four hours after his meeting with Mr. Anderson.

MR. SOFFEN: And he never submitted a proof to Mr. Anderson.

MR. TRAMONTINE: Mr. Anderson is one of the affiants we asked to be produced here, and he was not.

MR. SOFFEN: If you will look at the earlier Cizlini affidavit --

THE COURT: I did.

MR. SOFFEN: So that we have two affidavits saying that he was told not to use it, and you have Mr. Cizlini saying he just doesn't recall being told not to use the name.

THE COURT: No. He says, "The remaining copy to be used in the display was given to me orally by Mr. Anderson."

MR. SOFFEN: But there was no copy, there was no wording in that copy, your Honor. There were no words --

THE COURT: Look, you could argue here till

past midnight, and you'd never convince me that the store manager didn't tell Cizlini to use "Get-There," because common sense would teach me that Cizlini is not going to invent it. He is not in the shoe business.

MR. SOFFEN: You have to remember that there was the affidavit of Anderson, which says that there was a discussion with Cizlini, and as part of the discussion certainly there was a discussion that it had a ripple sole similar to the "Get-There" shoe, and this got converted by Cizlini to putting these two words in this one ad in this one newspaper one time, and it has never been repeated again. And there is no showing of any irreparable damage from this one thing that was against company policy and company orders and has never been repeated, and there is a whole list of ads --

THE COURT: What harm would it do if I issue a preliminary injunction?

MR. SOFFEN: One of the harms it will do us is in the publicity. This case is getting a lot of publicity, unfortunately. In fact, in a similar case involving these parties in Chicago, Judge Will has issued an order ordering Famolare to refrain from further publicity, and it's -- I'd like to say --

MR. TRAMONTINE: My client will not issue any

press release, I can assure you, if your Honor orders on this preliminary injunction, if your Honor wants that.

MR. SOFFEN: I would like to enter this order in Chicago on the publicity aspect here.

THE COURT: All right. Do you want it marked as an exhibit?

MR. SOFFEN: Yes, please.

THE COURT: All right, Exhibit 2 is the Judge Will order.

(Plaintiff's Exhibit 2 deemed received in evidence.)

MR. SOFFEN: But the harm, your Honor, this is very close to --

MR. TRAMONTINE: Your Honor, this was an agreed order, and it has attached to it an agreed press release.

MR. SOFFEN: Your Honor, this case is very close to the United Farm Workers case that we cited in our memorandum. There, there were four instances, and the Court was very careful, this Court, and that was Judge Pierece speaking for this Court, saying that, "Before preliminary injunction will issue, the moving party must demonstrate the likelihood he will ultimately prevail on the merits and he will suffer greater irreparable injury from denial than the opposing party."

Then he goes into publicity, too: "The mere announcement to the public that Sloan's has been preliminarily enjoined in this case would convey an incorrect impression of defendant's position with regard to the plaintiff, would misrepresent its good faith efforts, and would likely do considerable injury to its general business reputation which is not presently justified by the record."

In that case he said, "The defendant acted in good faith, the defendant has simply inadvertently misstepped in its attempt to comply with plaintiff's request and has acted to avoid mistakes in the future," which is just what we have, which is just what our record shows.

One isolated ad by a store manager, contrary to the entire company policy on putting out ads does not warrant this drastic remedy of injunction.

This ad came out in January, January 22nd. They waited a month to bring this motion and order to show cause. It's being argued a month later.

In the last two months, nothing else has happened, and that is all there is, that is all there is likely to be.

We don't believe this is the kind of case that requires this extraordinary remedy. There is just no irreparable damage going on here.

This is just this one isolated instance. It's a large company. It was one misstep or one error of confusion, one advertisement.

The circulation of the paper is 16,000, as distinguished from the widespread nationwide advertising campaign on both sides, and this shouldn't bring about all of this kind of relief, it simply isn't called for here.

This will not happen again, and it was against plaintiff's policy to begin with.

Their policy is not to have the store managers make up these ads. It's to have them come from headquarters. And the store was being remodeled.

THE COURT: That policy will be lived up to. You ought to be grateful, because your policy will be lived up to more certainly if an injunction is issued.

MR. SOFFEN: Our policy will be lived up to without an inuunction, and this one misstep we submit --

THE COURT: So I keep saying, the injunction can't possibly hurt you.

MR. SOFFEN: But that, your Honor, is not the rule, injunctions can't hurt anybody who isn't doing anything.

THE COURT: There isn't any doubt but what a

unit of your business deliberately infringed those people's trademark. There is no doubt about that. I so find.

MR. SOFFEN: Well, I think there's great doubt about it.

THE COURT: Well, I don't, on this record. It may be, if you say there is one instance --

MR. SOFFEN: There was confusion in an oral conversation.

THE COURT: I don't believe there was any confusion whatever. I believe this man deliberately told Cizlini to use "Get-There."

MR. SOFFEN: This man is not an officer or manager of the company. He runs one store out of hundreds of stores.

THE COURT: It may be. That I will accept.

MR. SOFFEN: And there is a limit as to how this can be policed, and this happened in one isolated instance. It did not happen before. It has not happened since, and certainly, under the cases we cited, this is simply not the basis for a preliminary injunction, and I direct your Honor's attention --

THE COURT: I think that when people are shown to have deliberately infringed a trademark of "Get-There," it seems to me that injury has been shown. They show me

that the shoes differ in quality, they differ in price, that Famolare has spent a lot of money exploiting the mark "Get-There." That is shown by the way it's thrown around in the internal documents of Scoa. They evidently know it very well, and I see not the slighest reason why they shouldn't have an injunction.

MR. SOFFEN: Your Honor, I would say I wouldn't give that interpretation at all on the internal documents. I think you might want to take another look at that. It has never been represented, except in this one isolated, unauthorized ad, as a "Get-There" shoe.

I do not know of one case, and the defendant has not cited a single authority in their brief and in their reply brief to show that a preliminary injunction was granted in a trademark case for one publication or one instance.

As I say, the United Farm Workers case showed four instances like this, and the Court refused the injunction.

The other cases had even more, but there is no case that they cited which is based on a single advertisement in a small town paper which was sosmall that Mr. Cizlini never sent the proof back, as he would have if it was a bigger ad. There's just a lot of speculation

that there has been damage. It appeared only on one date. It did not appear again out of all the thousands of ads that are being published all over the country by both sides.

This is the only thing they have to complain of. And this doesn't justify this kind of extraordinary relief.

THE COURT: Well, I can't approve of the conduct of Scoa when the young lady came in. I accept her testimony. I think she is a credible witness.

MR. SOFFEN: Your Honor, if we had a chance to present the salesman, now that we can find him, I think we could rebut that testimony, if you would give us an opportunity.

The point is we did not -- the salesman is obviously in California. We didn't know who the salesman was. We could have brought in the store manager and everybody else, but it was one lower level salesman who did this, who couldn't even spell the name right. And out of this and out of one single ad, they want this extraordinary relief, and I just know of no authority where this kind of relief has been granted, and I would ask leave at least to present something on our own to impeach this testimony, if this is what your Honor --

THE COURT: I am prepared to hear it.

MR. SOFFEN: Your Honor, the salesman is in California.

THE COURT: Look, I've tried to make it clear, but you haven't apparently been in the courtroom. I haven't got the luxury of just sitting around twiddling my thumbs and suiting the convenience of litigants. I've got to get on with it, constantly bedeviled from morning to night. It's the lowest damned job in the United States -- not a lower damned job -- indecent, degrading, and humiliating. But I've got to get on with it, at least for another year. My sentence is up in one more year.

So I cannot give you any more time. Don't you know I've got cases like this for next Friday, and the next Friday, and the next Friday?

MR. SOFFEN: Can we submit, your Honor --

THE COURT: No, you cannot. I've got to get on with it, man.

MR. SOFFEN: Well, I just think it is unfair that I ould not until this time --

THE COURT: Well, you've got to address yourself to the Congress or the Chief Justice. I can't help the degrading conditions in this court.

MR. SOFFEN: All I'm saying is --

THE COURT: You don't think I like to sit here until six-thirty on a Friday afternoon?

MR. SOFFEN: I don't think any of us appreciate it, your Honor.

THE COURT: I beg your pardon?

MR. SOFFEN: I don't think any of us appreciate the hour.

THE COURT: No, of course not.

MR. SOFFEN: I just would ask your Honor to consider the record as it is, and I know it's unfortunate but I could have brought four witnesses from California, and they could have been the wrong ones, until I heard this young lady testify. And I didn't know -- didn't even know her name or that she was coming till yesterday.

Now, all I want is an opportunity, if this testimony is relevant to your Honor's decision, to at least --

THE COURT: Well, of course it's relevant. I'd like to be able to accommodate you. If I had my way and could schedule my own calendar and deal with matters as I see fit, of course I'd try to accommodate you.

MR. SOFFEN: You know --

THE COURT: But this is a place which is dedicated to the production of statistics. How many

cases do you get finished with? How do you compare with Judge X? Judge X has finished 100 cases. You sloth have only finished ten. Get cracking. Maybe we will be holding court on Sundays.

Oh, it's a thoroughly disgraceful condition, but I didn't bring it about.

MR. SOFFEN: I just say we shouldn't have an injunction by surprise testimony here, your Honor.

THE COURT: They gave you notice that they were going to apply now.

MR. SOFFEN: Yesterday, yesterday afternoon, and I had no way of getting anyone here from Visalia, California.

MR. TRAMONTINE: Your Honor, I asked on Wednesday for people from Visalia, California. They said, "We won't do it. We won't bring them Friday or any other Friday."

MR. SOFFEN: That wouldn't have helped on bit because I didn't know who this salesman was. I should have taken the deposition or something, if I knew ahead and at least established who I should bring down to contradict this. Now I have no opportunity. I'm foreclosed.

THE COURT: I regret it. I regret it.

MR. SOFFEN: And I frankly don't see that this one instance by some lower salesman in the store

warrants an injunction. There'd be an injunction in every trademark case at this rate automatically because of salesmen --

THE COURT: Well, if there is --

MR. SOFFEN: -- and that isn't the rule.

THE COURT: If there is a deliberate infringement of a trademark, I don't know why there shouldn't be an injunction.

MR. SOFFEN: There isn't.

THE COURT: I find that there was.

MR. SOFFEN: I don't agree. What can I say?

THE COURT: I understand.

MR. SOFFEN: I don't think that the affidavits justify that conclusion on both sides. I don't see how that conclusion can be drawn.

We have two affidavits to the contrary. We know from the record there was never any printed text presented with the word. I was all an oral conversation. It was a mistake. It's a mistake that has not been repeated since.

As I understand the law in trademark cases, this is not sufficient for a preliminary injunction, or else, as I say, anybody with a trademark, there can be one slip and an injunction, and that is not the rule.

That is our position on this. And we have tried to brief it.

We direct the Court, if the Court pleases, to the cases we cite in our brief before your Honor reaches a decision on this.

THE COURT: Well, you have a point that there is just one store in California involved. I recognize that is a point. But, on the other hand, it does seem to me highly suspicious that within your company you are throwing around the trademark name as a description of shoes that aren't made by the applicant here.

MR. SOFFEN: You mean the "Get-There" name, or are you speaking of others?

THE COURT: Yes.

MR. SOFFEN: I don't believe that is the case, your Honor.

THE COURT: If you look at those four papers?

MR. SOFFEN: I don't believe so. The exhibits, I believe, refer to other cases and other insrances.

The "Get-There," they're throwing it around only in the sense of telling their people not to use it. There is no --

MR. TRAMONTINE: Exhibit J, counsel, if you

would like to look at it.

MR. SOFFEN: It's imply a means of internal identification.

THE COURT: They aren't identifying Famolare shoes in that way.

MR. SOFFEN: Your Honor, I point to one thing. If you look at Exhibit J, which counsel relies on, note the date on that, May 16, 1975.

THE COURT: Yes.

MR. SOFFEN: That is seven months before this occurred, and June '75. There's been nothing since that time. Before that time, there's this one memorandum, and it's used simply as a manner of internal identification. It has nothing to do with any representations made to the trade or to customers.

THE COURT: No, but the fruit of using a trademark to refer to your own merchandise is the incident that occurred in California.

MR. SOFFEN: But this has nothing to do with that. I don't connect the two at all. I don't see --

THE COURT: I say that the attitude of the company, that they can use freely a trademark that doesn't belong to them, generates an attitude within the company which inevitably leads to such incidents as that in

California.

MR. SOFFEN: Well, I must say this, that in this one memo here, which is the only thing relied on, the term is in quotes; it's recognized as a trademark --

THE COURT: I'm sorry, all I can do is to call it the way I see it, and I think the applicant should have his injunction. If he will submit an injunction on notice to you, with the appropriate findings, I will consider it.

MR. TRAMONTINE: Thank you, your Honor.

THE COURT: All right.

I'm sorry, I can just do the best I can.

All right. Good night.

-oOo-

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Paula Shepherd	4	15		

EXHIBIT INDEX

Defendant	Identification	In Evidence
A	9	10
B	9	10
C	11	12
D	15	
E		29
F		32
G		32
H		32
I		33
J		34
K		36
L		36
M		36
N		37
O,P,Q		40
Plaintiff		
1		42
2		46

"WALK ON AMERICA" ADS

12/08/75 - ~~12/12/75~~

Newspaper	Amount
Advertiser-Lafayette, La.	73.71
Advertising Development Service-N. Hollywood, Ca.	255.00
Airway Center Merch. Assn.-Dayton, Ohio	58.50
Albert Lea Pub. Corp.-Albert Lea, Minn.	52.65
Alexandria Daily Town Talk-Alexandria, La.	66.62
Alice Echo News-Alice, Tex.	48.60
Anderson Newspapers-Anderson, Ind.	110.70
Antelope Valley Press-Palmdale, Ca.	71.01
Billings Gazette-Billings, Mont.	108.00
Cincinnati Enquirer-Cincinnati, Ohio	376.32
Columbus Dispatch-Columbus, Ohio	403.20
Columbus Republic-Columbus, Ind.	57.78
Commercial News-Danville, Ill.	90.72
Corpus Christi Caller Times-Corpus Christi, Tex.	155.25
Coshocton Tribune-Coshocton, Ohio	52.92
Courier Post-Hannibal, Mo.	36.80
Courier Times-New Castle, Ind.	33.84
Daily Gate City-Keokuk, Iowa	69.10
Daily Herald Telephone-Bloomington, Ind.	61.29
Daily Journal-Franklin, Ind.	23.80
Daily News-Longview, Wa.	75.14
Daily Times-Ottawa, Ill.	87.84
Decatur Herald & Review-Decatur, Ill.	147.15
Defiance Crescent News-Defiance, Ohio	42.00

Newspaper	Amount
Delphos Herald-Delphos, Ohio	33.84
Democrat Co. Inc.-Fort Madison, Iowa	28.67
Dodge City Daily Globe-Dodge City, Kan.	51.30
Duncan Banner-Duncan, Okla.	42.66
Eagle-Bryan, Tex.	78.30
Elkhart Truth-Elkhart, Ind.	78.32
Enquirer & News-Battle Creek, Mich.	95.78
Eugene Register Guard-Eugene,Ore.	74.06
Evening Review-E. Liverpool, Ohio	71.40
Fairmont Sentinel-Fairmont, Minn.	53.73
Fond Du Lac Reporter-Fond Du Lac, Wisc.	151.80
Fort Wayne Newspapers, Inc.-Fort Wayne, Ind.	111.78
Foster Eastport News-Portland, Ore.	107.16
Frederick News Post-Frederick, Mo.	107.21
Free Lance Star-Fredericksburg, Va.	129.60
Free Press Co.-Mankato, Minn.	171.99
Fremont Tribune-Fremont, Neb.	15.12
Fresno Bee-Fresno, Ca.	141.95
Galesburg Register Mail-Galesburg, Ill.	136.25
Globe News-Auburn, Wa.	96.52
Greater Beloit Daily Pub. Co.-Beloit, Wisc.	65.55
Greenville Advocate-Greenville, Ohio	52.92
Hastings Daily Tribune-Hastings, Neb.	37.71
Hawkeye-Burlington, Iowa	65.40
Herald Journal-Logan, Utah	21.67

Newspaper	Amount
Herald Mail Co.-Hagerstown, Md.	83.49
Highlander Pub. Co.-Hacienda Heights, Ca.	67.68
Huntington Pub. Co.-Huntington, W. Va.	156.06
Indiana Evening Gazette-Indiana, Pa.	59.40
Indianapolis Newspapers, Inc.-Indianapolis, Ind.	241.92
Interstate Shopper-Iowa City, Iowa	19.95
Jeffersonian Co.-Cambridge, Ohio	54.00
Johnstown Tribune Pub. Co.-Johnstown,Pa.	116.64
Journal & Courier-Lafeyette, Ind.	88.02
Journal & Review-Crawfordsville, Ind.	84.84
Kansas City Star Co.-Kansas City, Mo.	284.76
Kokomo Tribune-Kokomo, Ind.	117.94
Lakeland Ledger Pub. Co.-Lakeland, Fla.	118.80
La Porte Herald Argus-La Porte, Ind.	48.80
Lima News-Lima, Ohio	72.98
Logan Banner-Logan, W. Va.	78.75
Los Angeles Times-Los Angeles, Ca.	1,936.77
Louisville Times & Courier Journal-Louisville, Ky.	357.84
Lynns Printing Service-Mt. Pleasant, Mich.	15.60
Medford Mail Tribune-Medford, Ore.	54.60
Mediapolis New Era-Mediapolis, Iowa	33.00
Miami Herald Pub. Co.-Miami, Fla.	174.64
Mid Cities Pub.-Federal Way, Wa.	84.38
Minneapolis Star & Tribune-Minneapolis, Minn.	293.75
Mirror Printing Co.-Altoona, Pa.	75.06

Newspaper	Amount
Mission District News-San Francisco, Ca.	94.50
Montana Standard-Butte, Mont.	61.95
Morning Sun-Pittsburg, Kan.	45.52
Newark Advocate-Newark, Ohio	61.29
News Gazette-Champaign-Urbana, Ill.	78.30
News Journal Co.-Wilmington, Ohio	6.80
News Journal Co.-Wilmington, Del.	176.00
News Journal Corp.-Daytona Beach, Fla.	185.27
Newspaper Agency Corp.-Salt Lake City, Utah	151.80
News Sun-Waukegan, Ill.	83.15
News Tribune-Ft. Pierce, Fla.	62.10
Norfolk Daily News-Norfolk, Neb.	51.98
Northland Group-Superior, Wisc.	94.50
North Platte Telegraph-North Platte, Neb.	74.38
Oregonian Pub. Co.-Portland, Ore.	117.71
Palladium Item-Richmond, Ind.	82.89
Peru Daily Tribune-Peru, Ind.	37.59
Pharos Tribune & Press-Logansport, Ind.	58.37
Phoenix Republic & Gazette-Phoenix, Ariz.	25.41
Piqua Daily Call-Piqua, Ohio	65.55
Pittsburgh Press Co.-Pittsburgh, Pa.	649.09
Post Crescent-Appleton, Wisc.	72.64
Post Tribune-Gary, Ind.	235.54
Press Pub. Co.-Sheboygan, Wisc.	61.78
Quincy Herald Whig-Quincy, Ill.	61.11

Newspaper	Amount
Record Argus-Greenville, Pa.	52.45
Rockford Morning Star-Rockford, Ill.	108.90
Sacramento Bee-Sacramento, Ca.	196.88
St. Cloud Newspapers, Inc.-St. Cloud, Minn.	73.44
Salinas Newspapers-Salinas, Ca.	47.97
San Fernando Sun-San Fernando, Ca.	49.35
San Gabriel Valley Tribune-W. Covina, Ca.	321.09
Schnectady Gazette-Schnectady, N.Y.	112.99
Sentinel-San Diego, Ca.	301.20
Sentinel Star-Orlando, Fla.	365.31
Shelbyville News-Shelbyville, Ind.	54.78
Sidney Daily News-Sidney, Ohio	48.20
Sioux Falls Argus Leader-Sioux Falls, S.D.	221.28
South Bend Tribune-South Bend, Ind.	154.52
Southeast Missourian-Cape Girardeau, Mo.	96.00
Speedway News-Indianapolis, Ind.	75.00
Spenley Agencies-Newark,Ohio	521.00
Springfield Newspapers-Springfield, Ohio	118.15
Staunton Plaza Merch. Assn.-Staunton, Va.	81.00
Sun Publications-Overland Park, Kan.	148.50
Telegraph Herald-Dubuque, Iowa	6.48
Times Herald-Port Huron, Mich.	61.10
Times Recorder-Zanesville, Ohio	70.74
Today-Phoenix, Ariz.	132.30

Newspaper	Amount
Toledo Blade-Toledo, Ohio	210.50
Tribune Co.-Tampa, Fla.	199.20
Troy Daily News-Troy, Ohio	51.03
Tucson Newspapers, Inc.-Tucson, Ariz.	273.06
Valdosta Daily Times-Valdosta, Ga.	71.55
Valley View-Granada Hills, Ca.	59.25
Virginia Pilot Ledger Star-Norfolk, Va.	120.73
Washington Post-Washington, D.C.	915.12
Wenatchee World-Wenatchee, Wa.	64.84
Wichita Eagle Beacon-Wichita, Kan.	182.87
Xenia Daily Gazette-Xenia, Ohio	52.65

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Eastern DIVISION 112a

Name of Presiding Judge, Honorable Hubert L. Will

Cause No. 75 C 2708 Date September 18, 1975

Title of Cause: Famolare, Inc. v. Edison Brothers Stores, Inc. and USM Corporation

Brief Statement of Motion: Motion for Temporary Restraining Order by USM Corporation

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: James P. Hume, Gerald D. Hosier, Raymond P. Niro
Hume, Clement, Brinks, Willian, Olds & Cook, Ltd.
One IBM Plaza - Suite 4100
Chicago, Illinois 60611

Representing: Defendant and Intervenor

HUME, CLEMENT, BRINKS, WILLIAN, OLDS & COOK, LTD. RECEIVED SEP 23 1975

Names and Addresses of other counsel entitled to notice and names of parties they represent.

Dimitri D. Allegretti
~~Molinare, Allegretti, Newitt & Witcoff~~
135 South La Salle Street
Chicago, Illinois 60603

Plaintiff

RECEIVED BY PATENT DEPARTMENT SEP 25 1975 REF'D ANS'D

Reserve space below for notations by minute clerk

Temporary restraining order entered. (Duff)

ill, J
ltd
9/22/75
1-23

PLAINTIFFS EXHIBIT EX-2

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FAMOLARE, INC., Plaintiff,	)	
v.	)	Civil Action No. 75 C 2708
EDISON BROTHERS STORES, INC., and USM CORPORATION, Defendants.	)	

AGREED ORDER

Until a final judgment is entered in this cause, or the cause is otherwise dismissed, it is hereby ordered, the parties through their respective counsel consenting hereto, that:

1. Plaintiff, Famolare, Inc., its officers, employees, agents, servants, attorneys and all those in active concert or participation with them:

(a) shall not disseminate, publish or disclose any information to the press or the public regarding this civil action, designated No. 75 C 2708.

(b) and shall not through use of the press or other public media advertise, disseminate, distribute or publish any information regarding liability or potential liability under any of the alleged proprietary rights of plaintiff asserted in this civil action

except for release and dissemination of public records, public documents or other factual statements of the status of this civil action upon request.

2. The parties, jointly or severally, may issue the press release attached hereto as Exhibit A.

3. Entry of this order does not constitute a waiver by any party hereto of any defenses or allegations and does not create or imply a presumption or admission against interest of any fact or point of law.

4. Plaintiff, Famolare, Inc. may apply for relief from and/or a modification of paragraph 1(b) of this Agreed Order upon a proper showing.

So Ordered:

Date: Sept. 19, 1975

United States District Judge

Agreed:

Attorney for Plaintiff

Attorney for Defendants

PRESS RELEASE

In an Order issued on September 19, 1975, the United States District Court for the Northern District of Illinois granted the Motion of USM Corporation to intervene and join as a party defendant in the pending lawsuit filed by Famolare, Inc. in Chicago against Edison Brothers Stores, Inc., a retail distributor of shoes having a wavy sole design. The Chicago Court also ordered that Famolare, Inc. be enjoined from disseminating, publishing or disclosing any information to the press or the public regarding the Chicago action and advertising, disseminating, distributing or publishing through the press or other media any information regarding liability or potential liability under any of the alleged proprietary rights of plaintiff asserted in this civil action, except for release and dissemination of public records, public documents or other factual statements of the status of this civil action upon request.

USM Corporation manufactures shoe soles which have been accused to infringe alleged proprietary rights of Famolare, Inc. As an intervenor in the Chicago litigation, USM has filed an Answer and two Counterclaims which assert respectively that Famolare's design Patent No. 235,701 is invalid and not infringed and that Famolare has engaged in acts of unfair competition against USM.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FAMOLARE, INC., Plaintiff,	)	
vs.	)	No. 75 C 2708
EDISON BROTHERS STORES, INC., Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable HUBERT L. WILL, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on September 19, 1975, commencing at the hour of 10:00 o'clock a.m.

APPEARANCES:

MR. DENIS A. BERNTSEN,

appeared on behalf of the Plaintiff;

MR. RAYMOND P. NIRO,

appeared on behalf of the Defendant.

THE CLERK: 75 C 2708, Famolare, Inc., versus Edison Brothers Stores, Inc., and U.S.M. Corporation, motion for temporary restraining order by U.S.M. Corporation.

MR. NIRO: We have worked dilligently on this matter and have an agreed order and press release to present to you at this time.

THE COURT: Let me look at it.

That is all right. Let me see what the press release says.

(Document tendered to Court.)

All right. That is all accurate.

MR. BERTSEN: Thank you, your Honor.

THE COURT: Thank you, gentlemen.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FAMOLARE, INC., Plaintiff, vs. EDISON BROTHERS STORES, INC., et al., Defendants.	)	No. 75 C 2708

C E R T I F I C A T E

I HEREBY CERTIFY that I reported in shorthand the proceedings had in the above-entitled cause, before the Honorable HUBERT L. WILL, one of the Judges of said Court, on September 19, 1975, and that the foregoing transcript consisting of 2 pages, is a true and correct and complete transcript of my official shorthand notes so taken as aforesaid.

Dolores Brennan

Dolores Brennan, Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

EXHIBIT A IS A PHYSICAL YELLOW GALLENKAMP SHOE BOX

(THE ORIGINAL IS IN THE CUSTODY OF FISH & NEAVE)

USA 336-475
(ED. 4-23-71)

120a

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

A

Date

Callenkamp

EXHIBIT B IS A PHYSICAL RIGHT GALLENKAMP SHOE

(THE ORIGINAL IS IN THE CUSTODY OF FISH & NEAVE)

USA 335 - 475
(ED. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

C

RING THE REGISTER AT THIS END

G128 5/75

WRITE LEGIBLY AND WITHIN BOXES

CODE IS	WIDTH IS
0	AA N
1	A
2	B M
3	C
4	D W
5	E
6	2E 3E
7	4E
8	3A S
9	NO

QTY | STOCK NUMBER | SIZE | 1/2 | WIDTH CODE | AMOUNT

7 0330 457 | 5 | / | 2 | 1.59.99

STORE | MONTH | DAY

2501 | 12 | 6

SUB TOTAL | 1.59.99
SALES TAX | .96
TOTAL | 1.69.95
DEPOSIT
BALANCE DUE

SALESMAN

61 35169710

VOID | EMPL | LAYAWAY | CREDIT CARD

/ | / | / | /

EXHIBIT D IS A PHYSICAL RIGHT "GET THERE" SHOE

(THE ORIGINAL IS IN THE CUSTODY OF FISH & NEAVE)

USA 33s-475
(ED. 4-23-71)

DEFENDANT

124a

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

AFFDIAVIT OF MELINDA MORRIS

STATE OF CALIFORNIA)
) ss.:
COUNTY OF TULARE)

MELINDA MORRIS, being duly sworn, states:

1. I am employed by Safeco, a title insurance company, 3104 South Mooney Boulevard, Visalia, California 93277. I have been employed by Safeco for approximately two and a half years and my current position is Escrow Secretary. I am 22 years of age and a personal friend of Paula Shepherd.

2. On February 6, 1976, I went with Paula Shepherd to the Gallenkamp Shoe Store at 2129 South Mooney Boulevard, Visalia, Calif. The salesman who waited on us was young and had black hair. Paula Shepherd told him that she wanted to try on the shoe with the wavy sole and the salesman said "You mean the 'Get There' shoe".

3. After Paula Shepherd purchased a pair of shoes with wavy soles, she asked the salesman "What do you call them again?" and he answered "'Get There'". Paula Shepherd then asked the salesman to write down the name so she could remember it. The salesman then wrote on the shoe box "Get their's", making an erasure and saying that he did not know how to spell it.

Melinda J. Morris
Melinda Morris

[illegible] OFFICE IN
[illegible] COUNTY
My Commission Expires [illegible] 1979

Subscribed and sworn to
before me this 16th day
of March, 1976.

Notary Public

USA 33s-475
(Ed. 4-23-71)
DEFENDANT
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SCOA INDUSTRIES, INC.	:	
Plaintiff,	:	
v.	:	Civil Actic
FAMOLARE, INC.,	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

AFFIDAVIT OF CARLE C. CONWAY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

CARLE C. CONWAY, being duly sworn, states:

1. I am Vice President of defendant, Famolare, Inc. ("Famolare"), a corporation, organized and existing under the laws of the State of Delaware, having a place of business at 4 West 58th Street, New York, New York 10019. I have a general management responsibility at Famolare and am kept informed of the sales of Famolare's products including, specifically, the shoes sold under its registered trademark "GET THERE."

2. Famolare is the sole owner of the trademark "GET THERE" and the federal registration therefor and has, since March 1974, continuously and extensively used its "GET THERE" mark throughout the United States on and in connection with its promotion and sale of its unique, high quality shoes having wavy bottom soles.

3. Famolare has been highly successful, with its sales now reaching about $30,000,000 per year, half of which is from the "GET THERE" line. Approximately 20% of Famolare's sales are attributable to California and Famolare has many retail sales outlets for its "GET THERE" shoes in California.

4. Famolare has engaged in a nationwide campaign to advertise the "GET THERE" mark and the associated shoe products (see Exhibits A through G annexed hereto). The advertising has been distributed through radio, television, newspapers, newspaper supplements, magazines, trade brochures and trade shows. In 1975, Famolare spent approximately $100,000 in nationally oriented advertising and approximately $200,000 in regionally oriented advertising. The majority of these advertising expenditures is for the "GET THERE" line.

5. Famolare's "GET THERE" line of shoes is of uniformly high quality and has a unique design and structure. The line has received considerable praise and favorable comment throughout the shoe and fashion industries (see Exhibits H through J annexed hereto).

6. As a result of Famolare's nationwide efforts, the words "GET THERE" have become known to the purchasing public and to the trade throughout the United States as the trademark identifying the wares dealt in by Famolare. The "GET THERE" mark has become distinctive, identifying the goods and only the goods of Famolare, and has become a symbol of the goodwill and reputation Famolare has developed in its products.

7. I first became aware of plaintiff SCOA's sale, offering for sale and advertisement of shoes having wavy bottom soles (strikingly similar to Famolare's "GET THERE" shoes) by use of the words "WITH GET THERE SOLE" when one of Famolare's salesmen in California forwarded SCOA's, d.b.a. Gallenkamp, advertisement appearing in the Visalia Times Delta of January 22, 1976, copy of which is annexed as Exhibit 3 to Defendant's Memorandum In Support Of Its Application For Order To Show Cause. I received the advertisement during the first week of February 1976, investigated the matter, and forwarded the information to counsel.

8. I believe that Famolare has lost and will continue to lose sales due to customer confusion and suffer irreparable damage to the goodwill and reputation it has established in the "GET THERE" mark and associated shoe products unless SCOA is enjoined.

9. SCOA has not been authorized by Famolare to use the "GET THERE" mark in any manner nor has it been authorized to copy Famolare's "GET THERE" shoe.

10. SCOA's shoe, as advertised by its Gallenkamp store with the phrase "WITH GET THERE SOLE", is significantly less expensive than Famolare's "GET THERE" shoe. The former retails at $9.90 a pair, and the latter retails at approximately $30.00 a pair. Accordingly, it is my opinion that the shoes sold by SCOA under the "GET THERE" name are likely to be of inferior quality to Famolare's "GET THERE" shoes.

11. Famolare has successfully concluded legal action to enjoin another infringer, Gordon Orwig, d.b.a. Gordon's Shoeland, from using Famolare's "GET THERE" trademark in connection with the sale of shoes in the United States District Court for the Western District of Washington. In that action, a permanent injunction (copy annexed hereto as Exhibit K) was entered by stipulation on December 9, 1975.

Carle C. Conway

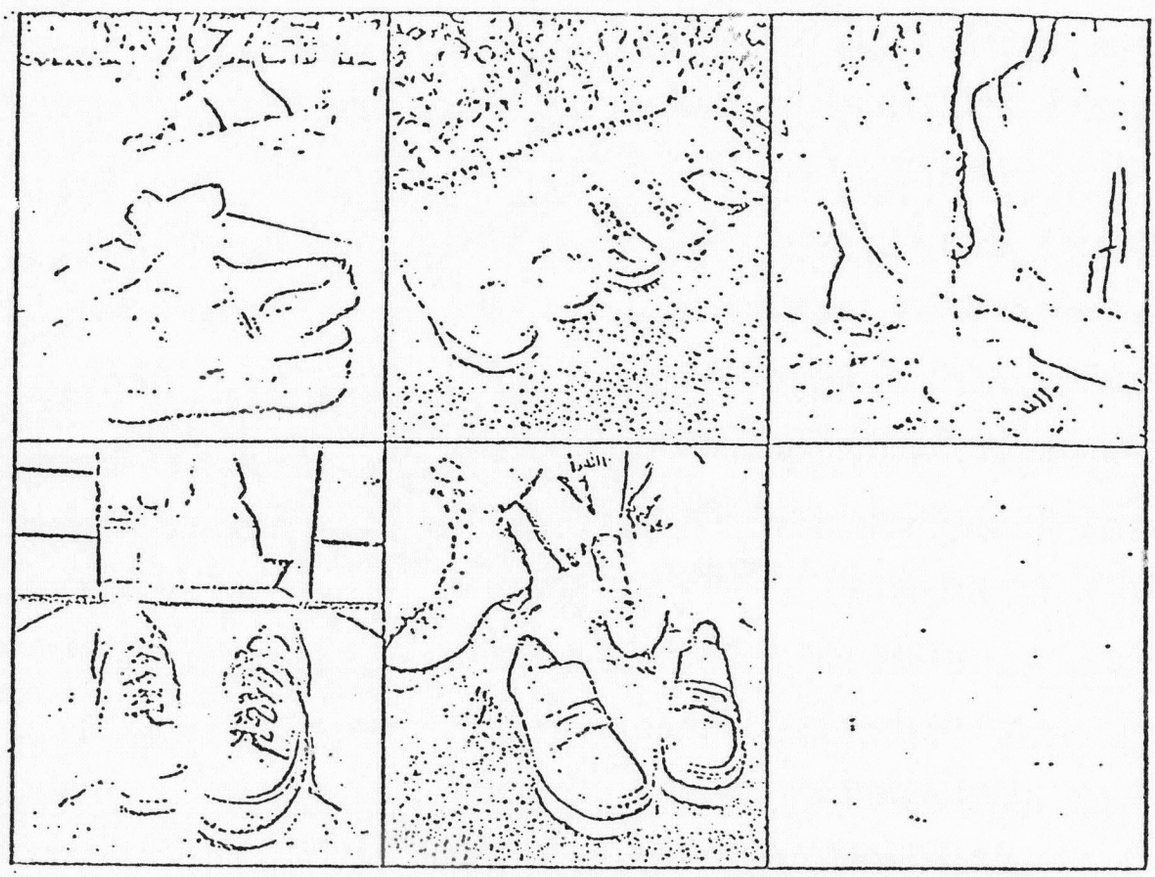
Subscribed and sworn to
before me this 27th day
of February, 1976.

Notary Public

WM. J. GILBRETH
Notary Public, State of New York
No. 31-4530775
Qualified in New York County
Commission Expires March 30, 1977

WHERE NOT TO WEAR THE GET THERE™

128a

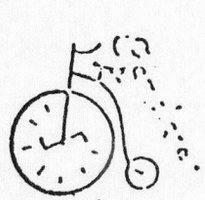


We've racked our brains to think of places where you can't wear the Get There.

Japanese with good tatamis hate them. You can't wear them to bed even though they feel like part of your foot. You can't wear them in the drink, but you can certainly have a drink in them. You can't skate in them, but you'll feel as if you're gliding on them.

If you have any ideas on where you can't wear this super shoe with the patented wave™ sole, we've left a square open. Fill it in and send your idea to Get There, Famolare Inc., 4 West 58th Street, New York, N.Y. 10019. About $30.00.

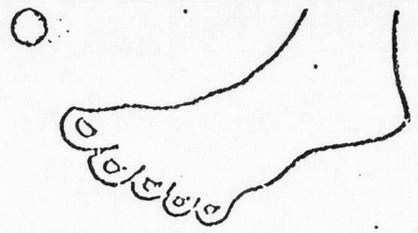
At Bamberger's.



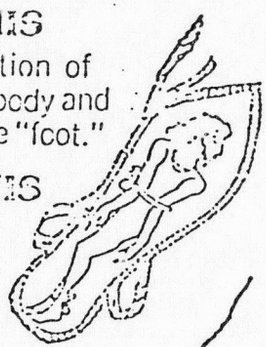
Copyright Famolare, Inc. 1975

*The characteristic appearance of this sole is a trademark of Famolare, Inc.

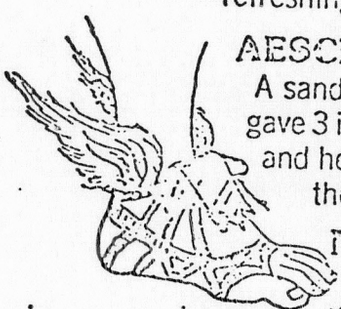
(Glamour, Sept. 1975, p. 123)
Exhibit A



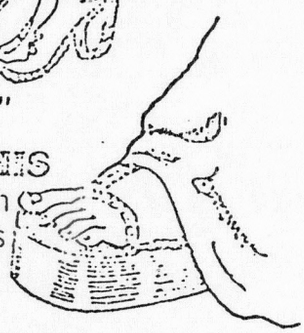
GOD PATENTED THIS
A well thought out amalgamation of bone, sinew, and skin to support the body and help man move around. It's called the "foot."



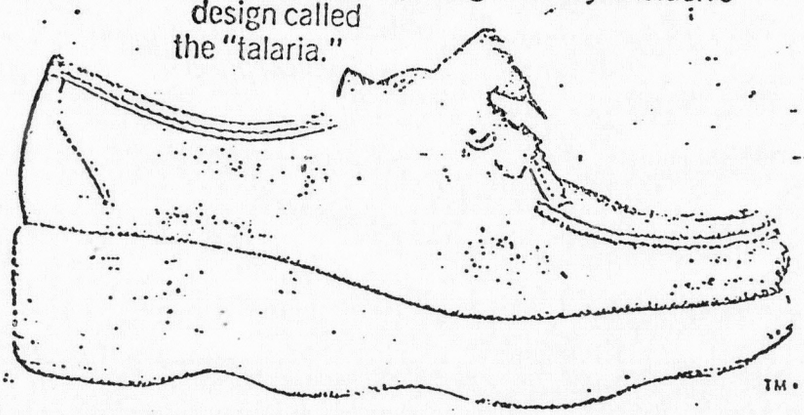
THE EGYPTIANS PATENTED THIS
The ultimate insult in 1150 B.C. By painting the face of an arch enemy on the soles of one's sandals, it was easy to stomp on them. Psychologically refreshing. It's called the "name shoe."



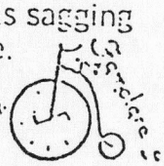
AESCHYLUS PATENTED THIS
A sandal with a platform sole which gave 3 inches of stature to short gods and heros in his plays. It's called the "tragic kothornos."



MERCURY PATENTED THIS A series of leather strips tied to flapping wings. A very exclusive design called the "talaria."



JOE FAMOLARE PATENTED THIS
A totally new concept in moving based on a wave™ sole so unique we put a patent on it. Molded in four crests, it boosts sagging postures as it turns walking into an effortless glide. It's made in Italy, comes in 40 different styles, and it's called the GET THERE™

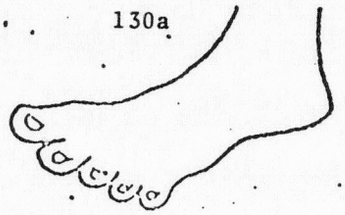


Famolare

•The characteristic appearance of the sole is a trademark of Famolare, Inc., 4 West 58th Street, N.Y., N.Y. 10019

(Seventeen, Aug. 1975, p. 95)

Exhibit B



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The ultimate insult in 1150 BC. By painting the face of an archenemy on the soles of one's sandals, it was easy to stomp on them. Psychologically refreshing. It's called the "name shoe."

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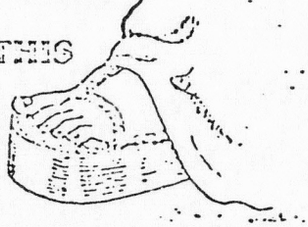
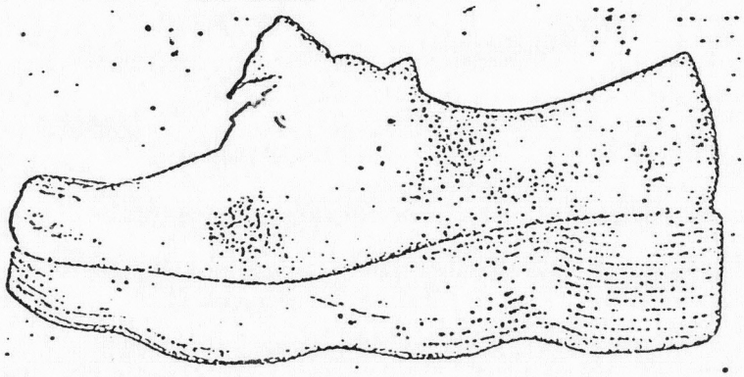


MERCURY PATENTED THIS

A series of leather strips tied to flapping wings. A very limited edition called the "talaria."



JOE FAMOLARE PATENTED THIS

(U.S. Patent No. 235,701 and other patents pending.) A totally new concept in movina based on Famolare's exclusive WAVE™ sole, so unique that the U.S. Patent Office is issuing several patents covering the design and construction.

This extraordinary shoe helps boost sagging postures, turns walking into an effortless glide, and is available exclusively from its patentee, Famolare. It's made with love in Italy, comes in all styles, and it's called the GET THERE™

Bunny Black's Royal College Shop

Eight Thirty Seven Massachusetts Street
Park Free in Project Soul, Use our rear entrance

(Lawrence Journal World, Aug. 15, 1975, p. 11)

Exhibit C

GET IT TOGETHER WITH THE "GET THERE" FAMOLARE SHOES

The "Get There"® shoes have really got it all! Style. Comfort. Support. And go. They're the first shoes created exclusively for walking. The main feature is a patented 4-crest sole that exercises leg muscles as it corrects posture. Turns walking into a natural, effortless movement.

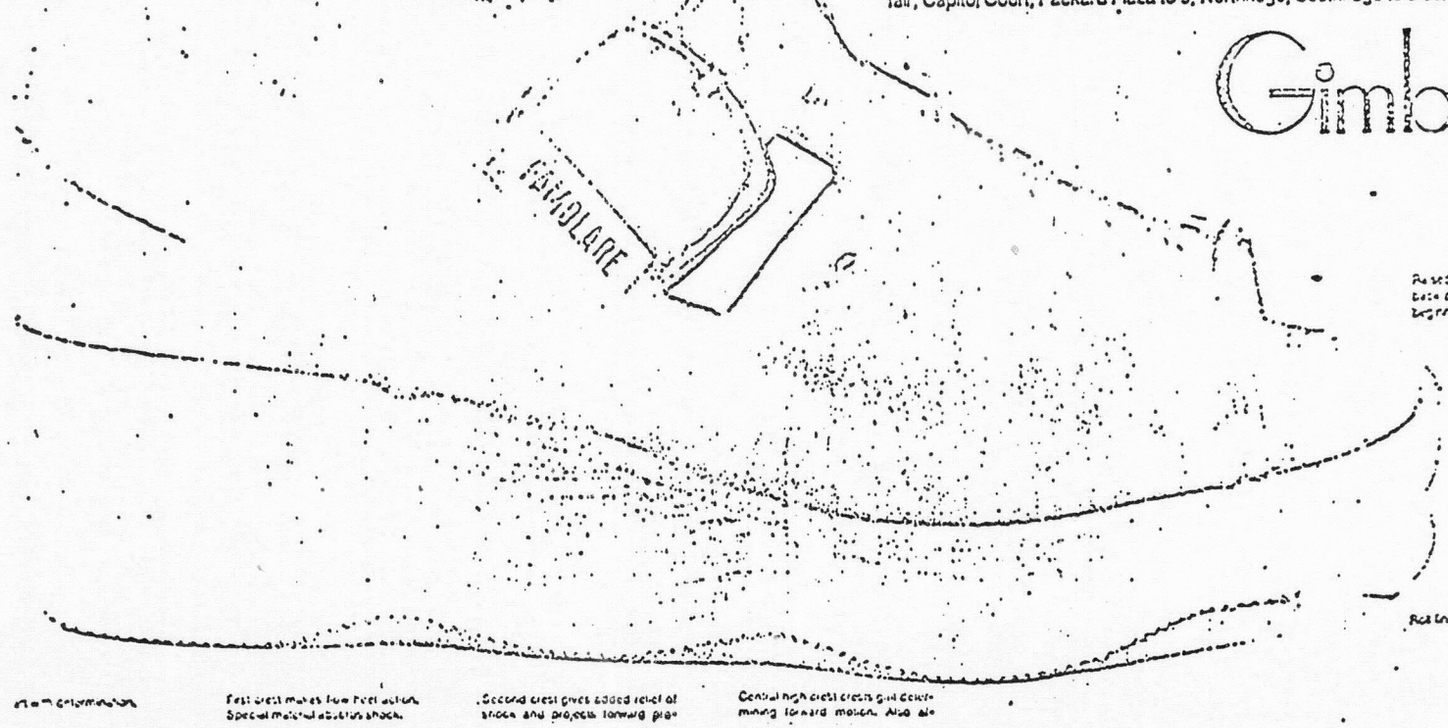
One from our "Get There"® collection: "Tomorrow." Sandal in white, navy & walnut leather. $27.

• The Shoe Place, All Stores (except Mitchell St. and Packard Plaza)

MEET MR. JIM JENSEN, a Famolare representative. He'll explain the principles of the "Get There"® shoes. Gimbel's Downtown Store all day, tomorrow, Sat., June 14th.

GIMBELS SUBURBAN STORES OPEN LATE SATURDAY NIGHT Southgate, Mayfair, Capitol Court, Packard Plaza to 9; Northridge, Southridge to 9:30.

Gimbels



Raised platform on the metatarsal bone of the foot stimulates and strengthens it.

Rocker action on the heel

Heel cup for stabilization.

First crest makes foot roll easier. Special material absorbs shock.

Second crest gives added relief at arches and projects forward step.

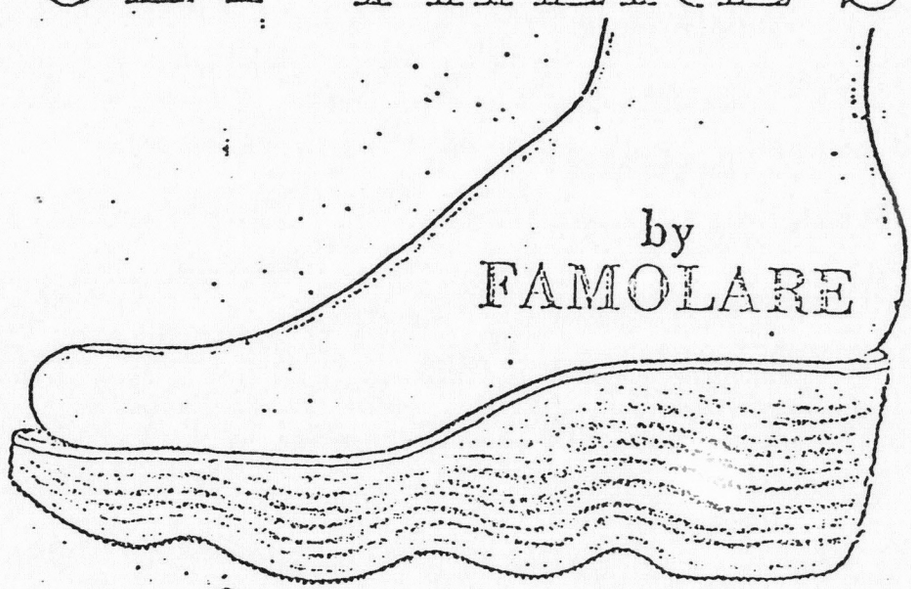
Central high crest cradles and determines forward motion. Also allows

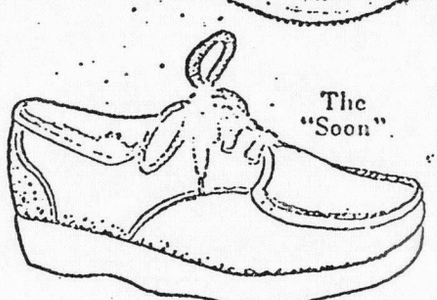
(The Milwaukee Journal, June 13, 1975, p. 7)

131a

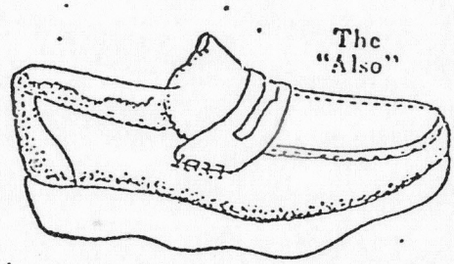
GO BACK TO SCHOOL in "GET THERE'S"

by FAMOLARE





The "Soon"



The "Also"

$31.00

$31.00

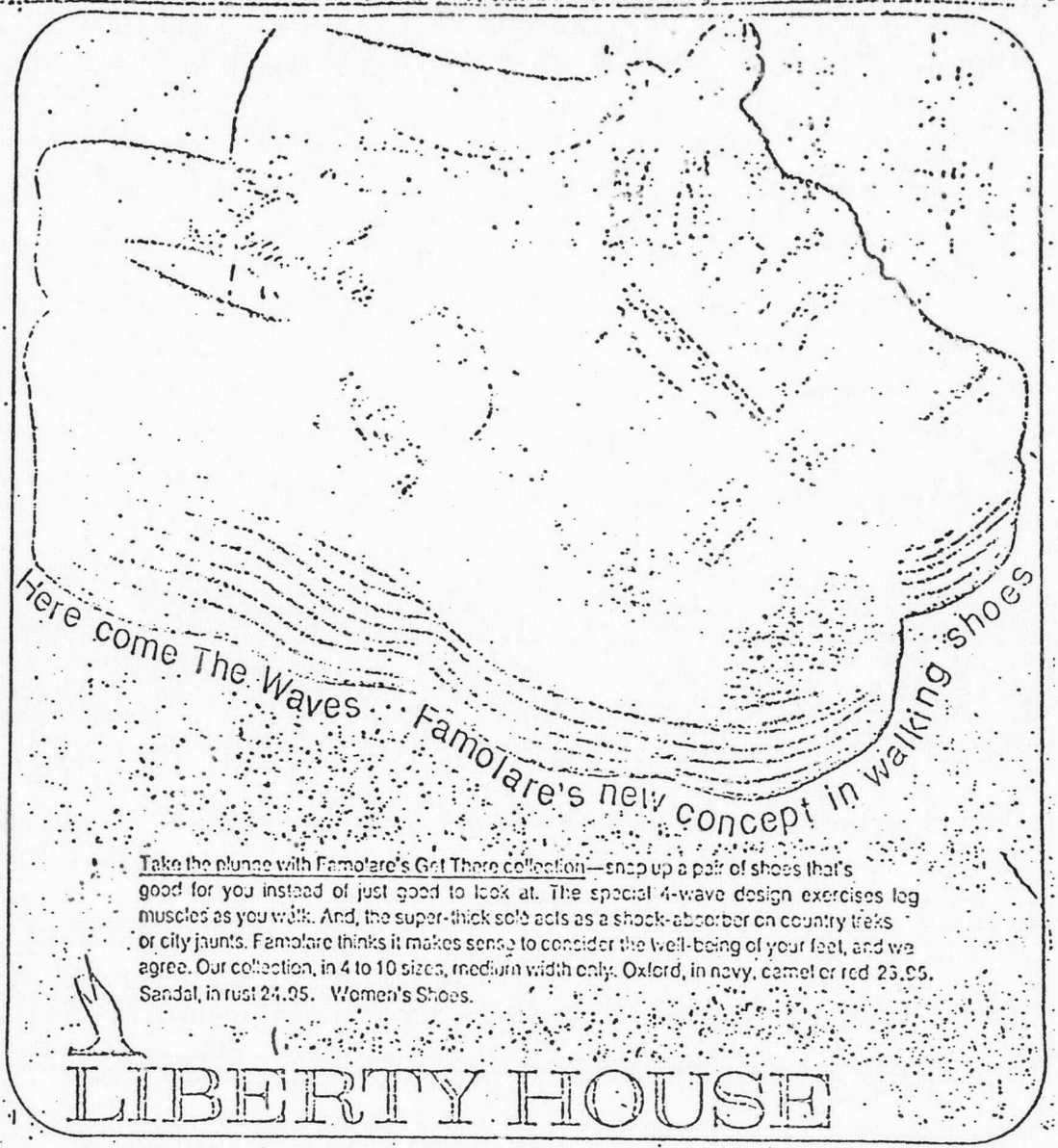
K-G BOOTERY

WEST PARK PLAZA

9:30-9 DAILY
9:30-6 SAT.
12:30-5 SUN.

(The Billings Gazette, Aug. 13, 1975, p. 12D)

Exhibit E



Take the plunge with Famolare's Get There collection—snap up a pair of shoes that's good for you instead of just good to look at. The special 4-wave design exercises leg muscles as you walk. And, the super-thick sole acts as a shock-absorber on country treks or city jaunts. Famolare thinks it makes sense to consider the well-being of your feet, and we agree. Our collection, in 4 to 10 sizes, medium width only. Oxford, in navy, camel or red 23.95. Sandal, in rust 24.95. Women's Shoes.

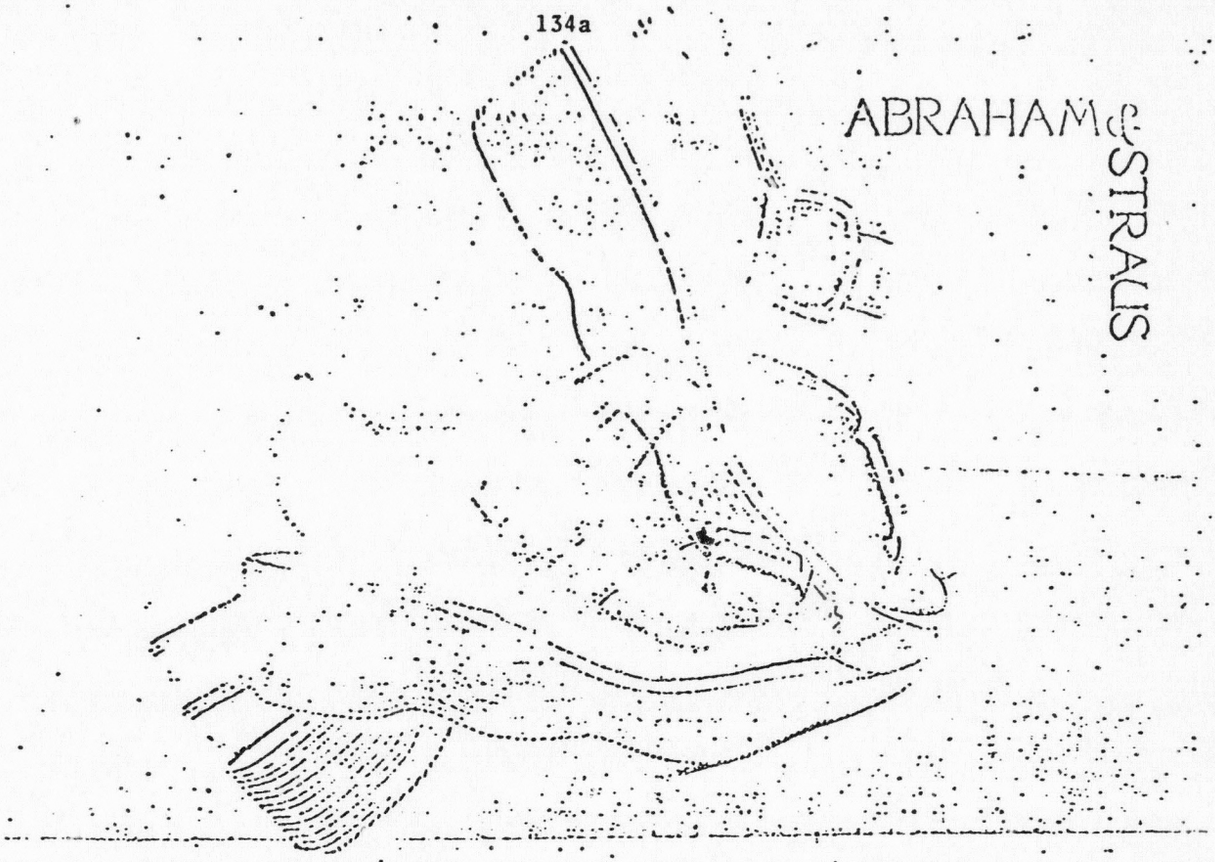
LIBERTY HOUSE

TACOMA MALL 473-1700 · LAKEWOOD 473-7211 · BOTH STORES OPEN SUN 12-5 · At Penney Corner

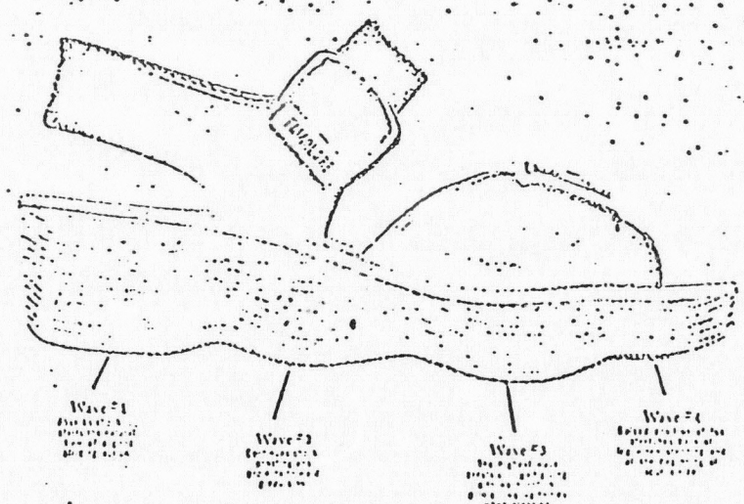
CALL US TOLL FREE FROM GIG HARBOR 858-9153 OR SOUTH KING COUNTY 838-1507

(Tacoma News Tribune, Feb. 27, 1975, p. A-16)

Exhibit F



ABRAHAM & STRAUS



THE WAVE OF THE FUTURE!

Famolare's "Get There" sandal with good-for-your-feet synchronized 4-wave sole

"Get There"...it makes walking a whole new experience! A revolutionary sandal that helps your feet, your legs, and your posture thanks to a unique 4-wave sole. Once you try a pair it will be hard to put your feet back in awkward, uncomfortable shoes. "Get There" comes ankle wrapped with all leather uppers in shades of walnut, saddle tan or white in sizes 5 to 10, no medium width

$27

ALL CHARGE ACCOUNTS ACCEPTED AT THE ABRAHAM & STRAUS STORE AND PHONE ORDERS FILLED within 10 days of receipt of order. Call or Send Check or Money Order. In Nassau County add 8% sales tax. In Suffolk County add 7% sales tax. In New Jersey add 6% sales tax. Shipping and handling charges are additional. Allow 5 days for delivery. Orders should be addressed to: Abraham & Straus, c/o P.O. Box 11, Brooklyn, N.Y. 11201. Add $2.50 for handling (P.S. and H.) on orders shipped outside the area and 6% for sales tax. All orders are subject to acceptance by A&S.

(New York Times, June 8, 1975, p. 38)

Exhibit G

BEST COPY AVAILABLE

Oregon Journal
PORTLAND, ORE.
D. 150,332 SAT. 131,524

AUG 5 1975

'Get There' Shoes Step Into Style

By MARJ ANDERSON
Journal Fashion Editor

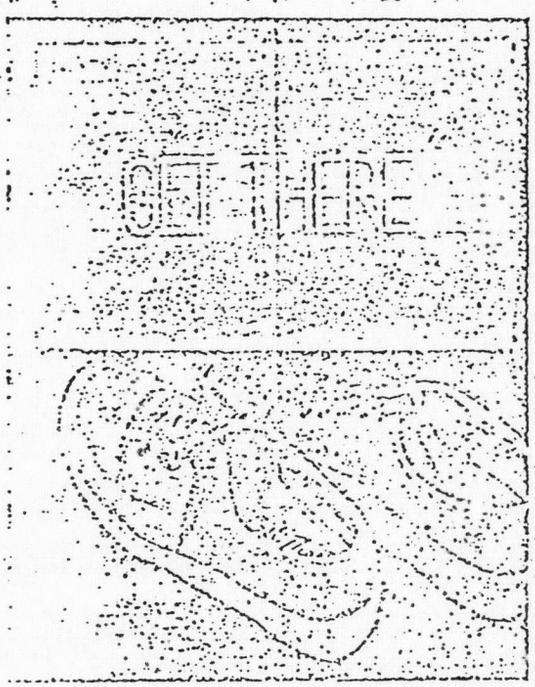
"Get There" shoes have brought Joe Famolare a long way on the path to success in his chosen field of shoemaking.

Reared in New England where shoe manufacturing is a way of life, Famolare recognized that the industry was dying and undertook to make his fortune manufacturing shoes in Italy for the American market.

Now he has more than six units in Italy and is beginning to think about reversing field and may bring his manufacturing back to the United States.

When, and if, I do it will be a different ball game with great management and production methods than the penies previously had in New England," Famolare told fashion writers assembled for the June fall-winter shoe previews in New York.

Talking about his "Get There" shoes Famolare told the fashion writers a patent had been issued this summer for the unique "wave" design of the shoe soles. Including, the sole, more than 20 claims unique to Famolare's design are included in the patent.



SOLE SHOES — Introduced less than a year ago, Italian-made "Get There" shoes are protected by a patent. Sole has unique wave pattern. Box explains the shoe design.

Since being introduced last fall more than 600,000 pairs of the "Get There" shoes have been delivered to American stores. At the present time the shoes are being manufactured at the rate of 150,000 pairs a month.

The shoes are made in only the basic colors of black, brown and beige.

Famolare is introducing men's shoes designed for use by policemen and mailmen. These will have the wave soles in black so that the shoes can be worn as part of the "official" uniforms designated by regulations.

Boxes used for "Get There" shoes are considered unique by many shoe people. There is an explanation of the wave sole and the important features of the shoe design printed on the box. The explanation has been translated and printed in French, German and Italian for shoes sold in those countries.

Famolare will travel to Seattle, Wash., later this month to appear in a charity promotion sponsored by Nordstrom. When interviewed in New York, he expressed a desire to stop in Portland at the Nordstrom stores while he is in the Pacific Northwest.

(Oregon Journal, Aug. 5, 1975)

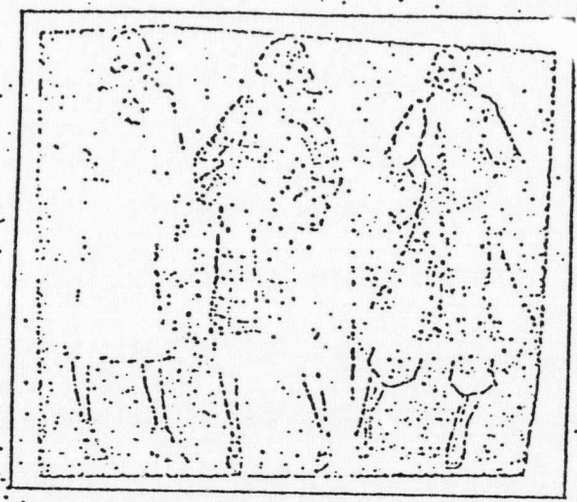
Exhibit H

OLYMPIAN
D. 20,000 .. S. 22,000

136a

JUL 6 1975 Sun

Look For Fall



TO TOE . . .

The writer is with the Rochester Democrat and Chronicle, a member of the Gannett Group of newspapers.

By SALLY WALSH
Gannett News Service

NEW YORK — Shoes this year are either good for you and good-looking or totally frivolous and guaranteed to make your feet look pretty while they hurt. There is not much in between.

Joe Famolare was one of the first shoe designers to realize that it is no longer chic to be sedentary, and he invented shoe fashions meant to be worn in comfort by active women. His famous "Get There" shoe has a wavy platform of crepe rubber. Now there is a higher platform version of the same, dubbed the "Hi-There" shoe. His collection at the American Designer Showings here include a wide variety of the ever popular wedges and platforms that cushion the foot and don't distort it.

This top designer has now come up with a tennis shoe with tunnels in the crepe soles that he says exhales when the foot is pressed down and inhales when it comes up. The breathing keeps the foot from getting hot. Air holes also appear in the leather upper. This new concept also appears in a walking sandal.

Famolare is not the only designer to jump on the practicality bandwagon. Flats are "in" for fall 1975 and the somewhat stylish and practical medium heel is "out." Look for tasseled moccasins, kilties, gillies and T-straps.

These styles have clearly been around before. Updated ones appear in two tones, preferably of brown, or in two textures (such as suede and calf) in the same tone. This is the shoe industry's answer to the fashion world's play of textures and tonalities.

For special occasions, when you don't care if your feet hurt, there are slender shoes designed to make the foot look small and delicate by pushing the heel to new heights of 3½ to 4 inches. Straps are thin, toes more pointed or open, and heels leaner than last year. These are the perfect shoes to wear with such delicate frothy fabrics as crepe de chine, chiffon and georgette.

The latest stockings are textured. Lacy will be very subtly done for dressy occasions and bolder for day. With flats, heavy, ribbed stockings in tones cued to the rest of the costume will complete the head-to-toe play of textures and tones.

(Olympian, July 6, 1975)

Exhibit I

Famolare Debuts Get There Sole.

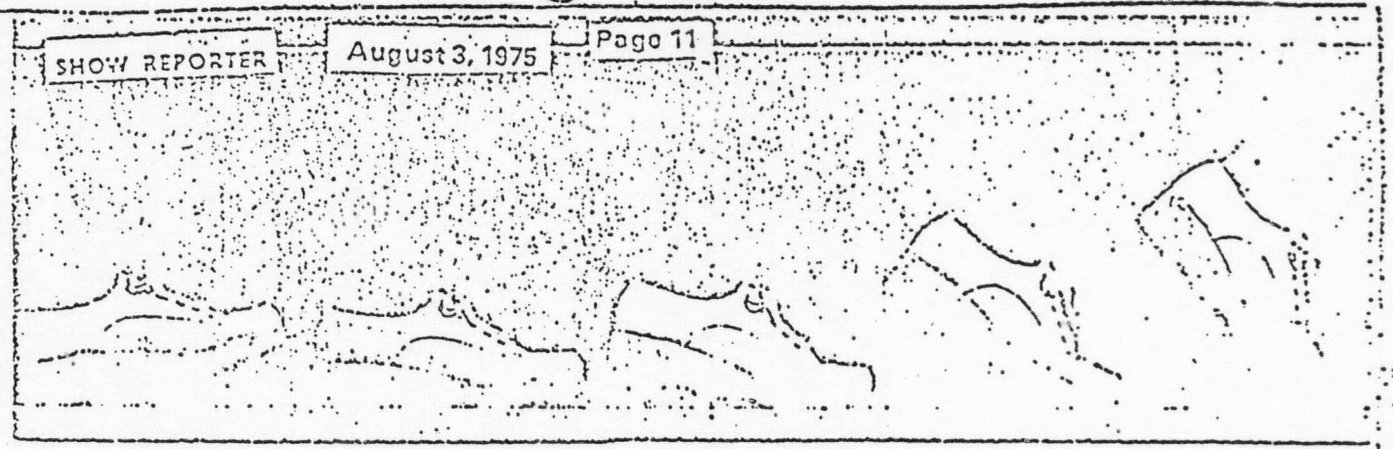
Joe Famolare, the maverick shoe man who has built up an international network of shoe production centers — the USA, Italy, Sardinia — for his unique shoe fashions, calls his new Get There sole "the fashion equivalent of space-walking." The patented 4-wave sole is made of a new substance stronger and more resilient than crepe.

The Get There is no clunky, cumbersome foot anchor for the girl or woman who loves the young platform fashion. It does all the right things like adding length to the leg look, correcting posture and turns walking into an effortless, natural activity.

"The whole concept is so different we think it will be adapted in a lot of other types of shoes," says Joe Famolare. "The way the Get There moves, you understand how the body moves, the anatomy of walking when it becomes a soft rhythm. The body is spared the hammer-like shocks of ordinary steps.

"Modern clothing generally is benefitting from modern scientific discoveries. Insulation, weightlessness, shape retention, water-shedding, all have things are affecting what we wear. Now we've been able to combine several such factors in this shoe."

Famolare's first group of



Anatomy of a step which Famolare terms "the fashion equivalent of space walking: The new Famolare Get There shoe photographed in 4-wave motions of walking. 1. Launch position as foot rests on rippling pad of porous, long wearing foam. 2. Heel wave absorbs shock and rolls to second wave. 3. Second wave beneath arch gives forward propulsion. 4. Central wave determines direction and flexes leg muscles. 5. Toe wave rolls foot onto next step.

(Show Reporter, Aug. 13, 1975, p. 11)

Exhibit J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FAMOLARE, INC., Plaintiff, v. GORDON ORWIG d/b/a GORDON'S SHOELAND, Defendant.	CIVIL ACTION NO. C75-771 STIPULATION AND ORDER FOR PERMANENT INJUNCTION

COME NOW the parties hereto by their respective counsel of record and do hereby stipulate as follows:

1. That this Court has jurisdiction of the subject matter of the action and of the parties hereto;

2. That Plaintiff is the owner of the trademark "GET THERE"; said trademark is registered in the United States Patent Office under Registration No. 1,007,435; said trademark and registration are presently valid and subsisting; and Defendant has infringed said trademark; and

3. That the following Order for Permanent Injunction may be entered herein, and the parties waive all right to appeal therefrom, and all rights to recover costs.

RIDDELL, WILLIAMS, IVIE,
BULLITT & WALKINSHAW

By _____

ATTORNEYS FOR PLAINTIFF

Exhibit K

VAN BUSKIRK AND HAAS

By _____

ATTORNEYS FOR DEFENDANT

ORDER FOR PERMANENT INJUNCTION

The Court having considered the foregoing Stipulation, and finding that it has jurisdiction of the subject matter of the action and of the parties, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant Gordon Orwig d/b/a Gordon's Shoeland be, and he hereby is, permanently enjoined and restrained from:

(1) Using the mark GET THERE (however spelled, whether capitalized, abbreviated, singular or plural, printed or stylized, whether used alone or in combination with any other word or words, whether used in caption, text or otherwise, or orally, or any reproduction, counterfeit, copy or colorable imitation thereof) in connection with the sale, offering for sale, distribution, or advertising of shoes and like products and any other goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;

(2) Applying the mark GET THERE (as defined in paragraph (1)) or any reproduction, counterfeit, copy or colorable imitation thereof to labels, signs, prints, packages, wrappers, boxes, displays, receptacles or advertisements intended to be used, or capable of being used, or used in connection with the sale, offering for sale, distribution, or advertising of shoes and like products and any other goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake or to deceive;

(3) Using the mark GET THERE (as defined in paragraph (1)) either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to shoes or like products or any other goods, to cause confusion or to cause mistake, or to deceive;

(4) Otherwise infringing upon Plaintiff's registered trademark.

IT IS FURTHER ORDERED that the provisions of this Permanent Injunction shall apply to Defendant and to each of his successors, assigns, agents, employees, attorneys and to all other persons in active concert or participation with Defendant who receive actual notice of this Permanent Judgment by personal service or otherwise.

IT IS FURTHER ORDERED that the Defendant Gordon Orwig, within ten (10) days of the entry of this Permanent Injunction, deliver to a person designated by Plaintiff all labels, hangtags, poly bags, signs, boxes, displays, prints, packages, wrappers, receptacles, and advertisements in the possession or control of Defendant which might, if used, violate the injunction herein granted.

IT IS FURTHER ORDERED that all other claims which are asserted in the Complaint herein are hereby dismissed, without prejudice, to the extent said dismissal is not inconsistent with the terms of this Permanent Injunction.

Dated: December 9, 1975.

/s/ Walter T. McGovern
United States District Court Judge

Presented By:

of Riddell, Williams, Ivie, Bullitt & Walkinshaw
Attorneys for Plaintiff

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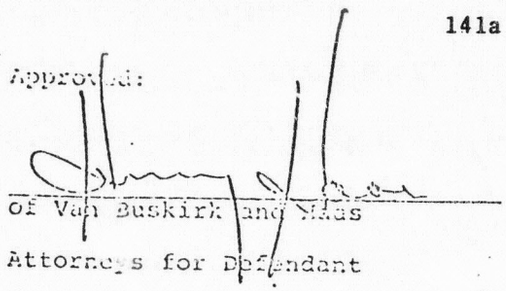
Approved:



of Van Buskirk and Maas

Attorneys for Defendant

RIDDELL, WILLIAMS, IVIE, BULLITT & WALKINSHAW
4300 SEATTLE-FIRST NATIONAL BANK BUILDING — 624-5600
SEATTLE 98154

USA 33s-475
(E.D. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

G

AFFIDAVIT OF PAUL R. CISLINI

STATE OF CALIFORNIA)
) ss.:
COUNTY OF TULARE)

PAUL R. CISLINI, being duly sworn, states:

1. I am currently employed as the Promotion Manager of the Visalia Times Delta, Visalia, California.

2. I have been employed by the Visalia Times Delta for approximately six years. My duties during each of those six years included the preparation of advertisements.

3. With regard to the advertisement of the Gallenkamp Shoe Store that appeared in the January 22, 1976 edition of the Visalia Times Delta, I do not recall Mr. Larry Anderson telling me not to use the name "Get There" in that advertisement. I am confident that if Mr. Anderson had told me not to use that name I would not have used it in the advertisement. I prepared that advertisement within not more than four hours after my meeting with Mr. Anderson.

4. It is the policy of the Visalia Times Delta to retain notes and other preparatory material on an advertisement for one week after the advertisement has been published. The purpose of that policy is to have the papers needed to deal with any complaint from the advertiser. It is the practice of the Visalia Times Delta to send copies of advertisements after publication (called "tear sheets") to the advertiser if the advertiser so requests. Gallenkamp Shoe Store in Visalia has a standing request for three copies of their advertisements to be sent to their Visalia shoe store promptly after publication and for two copies of their advertisement to be sent with their

monthly bill to Columbus, Ohio. I have no reason to believe that this practice was not followed with the January 22, 1976 Gallenkamp advertisement.

5. Prior to Friday, February 27, 1976, Gallenkamp Shoe Store had made no complaint with respect to the January 22, 1976 advertisement. During the period between January 22, 1976 and February 27, 1976, I had at least two conversations with Mr. Larry Anderson and he did not mention the January 22, 1976 advertisement in any of those conversations. The bill of the Visalia Times Delta for that January 22, 1976 advertisement has been paid in full.

6. After the publication of the January 22, 1976 advertisement, Mr. Larry Anderson never mentioned, orally or in writing, to me that advertisement or anything concerning that advertisement nor have I ever discussed it with him.

Paul R. Cislini
Paul R. Cislini

Subscribed and sworn to before me this 16th day of March, 1976.

David L. Rauber
Notary Public

DAVID L. RAUBER, NOTARY PUBLIC
My Commission Expires April 22, 1978
Tulare County California

USA 33s-413
(ED. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

AFFIDAVIT OF RICHARD R. PARKER

STATE OF CALIFORNIA)
) ss.:
COUNTY OF TULARE)

RICHARD R. PARKER, being duly sworn, states:

1. I reside at 3125 Green Oaks Drive, Visalia, California 93277. I am 51 years of age.

2. I own through a corporation two retail shoe stores in Visalia, California, namely Dick Parker Shoes, 117 East Main, Visalia, Calif., and Dick Parker Shoes, 3319 South Mooney Boulevard, Visalia, Calif. I have been in the retail shoe business in Visalia for 22 years.

3. Beginning in November 1974, my stores have sold shoes having wavy bottom soles under the trademark "Get There". All of these shoes were purchased from Famolare, Inc. To introduce the "Get There" shoes to the Visalia and surrounding area, my store advertised the "Get There" shoes extensively. A 30-second spot commercial on the "Get There" shoes was placed by my company with our local television station, Channel 26, and that commercial was run each day for one month. In addition, my company has placed advertisements for the "Get There" shoes with the Visalia Times Delta, the only newspaper in Visalia, at least once a month and during some periods once a week.

4. As a probable consequence of that advertising, the majority of the people who come into my stores and purchase "Get There" shoes ask for them by the name "Get There". People ask for those shoes by the name "Get There" approximately 5 to 7 times a day. The largest selling shoe in my stores is the "Get There" shoe. In one 3-day period, my stores sold 53 pairs of "Get There" shoes. We now sell an average of 5 to 10 pairs of "Get There" shoes a day.

5. My Mooney Boulevard store is approximately 6 blocks from the Gallenkamp Shoe Store at 2129 South Mooney Boulevard, Visalia, Calif. My Main Street store is approximately a mile and three-quarters from that Gallenkamp Shoe Store.

6. It is my belief, based upon, inter alia, the extensive advertising of the "Get There" shoe by our company and the fact that people ask for the shoe by the name "Get There", that the use of the words "Get There" in the January 22, 1976 Gallenkamp advertisement in the Visalia Times Delta has resulted in lost sales of "Get There" shoes by my company.

Richard R Parker

Richard R. Parker

Subscribed and sworn to before me this 16 day of March, 1976.

OFFICIAL SEAL
MARY L. COMPO
NOTARY PUBLIC - CALIFORNIA
TULARE COUNTY
My comm. expires AUG 23, 1979
123 S. Court St., Visalia, CA 93277

Mary L Compo

Notary Public

146a

USA 336-475
(ED. 4-73-711)

VISALIA TIMES-DELTA
Published by Visalia Newspapers In
P.O. BOX 31
VISALIA, CALIFORNIA 93277

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

I

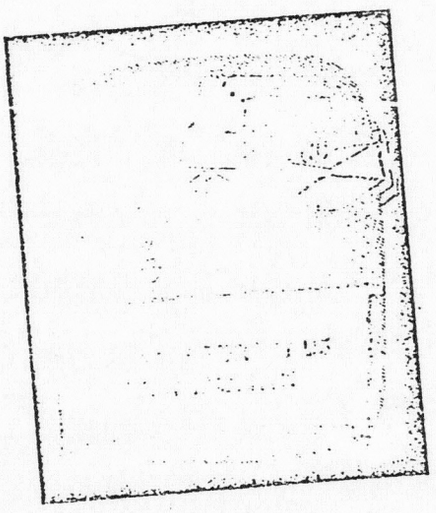
GALESMARTS SHOE CORP
PYER & ROMAN, ADV AGN
66 S. SIXTH ST.
COLUMBUS OHIO 43215

PLEASE DETACH THIS STUB AND RETURN WITH YOUR

DATE	DESCRIPTION	LINES OR INCHES	RATE	ACCUM.	CHARGES	CREDITS	LAST BALANCE IN THIS COLUMN 648.31
1\14\TS		21.75	1.00	21.75	21.75	.00-	669.96
1-15-76		21.75	2.25	786.00	48.94	.00-	718.90
1-22-76		21.00	2.25	807.00	47.25	.00-	766.15
1-30-76		78.75	2.25	885.75	177.19	.00-	943.34

#8501-100%

1/14-30.66
1/15-46.49
1/22-44.89
1/30-148.33



TEARSHEET OK

RATE OK

Discount passed

TERMS: 5% DISCOUNT may be deducted from the CURRENT CHARGES on this statement if your payment IN FULL reaches us on or before the 15th of the month immediately following date of charge.

TERMS: ALL BILLS DUE AND PAYABLE BY 15TH OF MONTH FOLLOWING DATE OF CHARGE, SERVICE CHARGE OF 1½% PER MONTH CHARGED ON ALL PAST DUE ACCOUNTS, WHICH IS AN ANNUAL PERCENTAGE RATE OF 18%.

Burroughs

VISALIA TIMES-DELTA

(D)

USA 33s-475
(Ed. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

Correspondence To Norrwock IN Reg: wavy bottoms

May 6, 1975

Mr. Jim Carter
SCOA Industries Incorporated
35 North Fourth Street
Columbus, Ohio 43215

Dear Jim:

This is to confirm our telephone conversation of this morning, concerning the high "Get There" bottom. The suggestions you made to the final adoption are as follows:

1. The welting is not defined enough, especially in the inside quarter.

2. On the toe there is a lip on the welting and you desire the welting to be flush as it is on the rest of the shoe.

3. The middle bump should be slightly larger; therefore, creating that all three bumps will be of equal proportion. When laid on a flat surface, they will all hit at the same time.

I have instructed Alin to proceed with the final adoption of this bottom.

Thank you very much for your kind suggestions.

Sincerely,

NORRWOCK SHOE COMPANY

Arnold Menzer

AM/pmt

cc: Messrs. A.V. Federle
S. Clayman
A. Fels

LEASED CONVENTIONAL DEPARTMENT
35 North Fourth Street Columbus, Ohio 43215

CONDITIONS OF THIS ORDER, ON REVERSE SIDE, ARE AN INTEGRAL PART HEREOF.

ATTENTION ACCOUNTS PAYABLE DEPT.

DATE: 6/26/75

PURCHASE ORDER NO.: 78772

OUR P.O. NUMBER MUST APPEAR ON ALL INVOICES, BILLS OF LADING, AND PACKAGES.

V.S. NUMBER: 22 [illegible]5

SHIP TO: #8200 DCH

2035 Innis Road

Columbus, Ohio

STATE

ROUTE: F.O.B. POINT: DRUCKER MOTOR EXPRESS

3 FACTORY NUMBER MUST BE STAMPED ON THE QUARTER LINING OF ALL SHOES. FACTORY NO. 71

STYLE NO.	TOTAL PAIRS	UNIT COST	TOTAL COST	CLASS	DIVISION	TYPE OF PURCHASE	DISTRIBUTION CENTER
[illegible]	240	7.85	2,826.00	1X	Dept 2	S	East

SEASON: N/A5 FALL 75-6 DELIVERY DATE: 8/1/75

DESCRIPTION:

Men's "Get [illegible]" tan glove leather oxford, long toe on vamp, Bulge Cut Shoe, welt button, three blind eyelets, dark brown round braided laces, welt American bound topline, hard counter, sueded counter pocket, moc stitching mount foiled sheet of Earth last,

PRIOR RUSH CONFIRMATION SAMPLE BEFORE CUTTING
OUR FACTORY NUMBER MUST BE STAMPED ON ALL SHOES

BILLING FORM: 8.79

RETAIL PRICE: 19.99

"Get [illegible]" PATTERN

LAST: Earth

SOCK LINING: 2/3 tan vinyl

SOCK STAMP: Dunhill

BOXES: Dunhill

W	3	-	4	-	5	-	6	-	7	-	8	-	9	-	10	-	11	-	12	-	13	14
D	334 328 3/11										1	2	2	2	2	2	1					
	Eye Added Solid Eyes										IV	IV	IV	IV	IV	IV	IV		IV		✓	
									Changed													
WIDTH	12	13	-	1	-	2	-	3	-	4			0	1	-	2	-	3	-	4	-	5

SPECIAL NOTICE

1. Please acknowledge receipt of order and confirm delivery date.
2. Stamp our stock number in the lower lefthand corner of the box.
3. Designate on all invoices store number and city where the goods were shipped. Vendor must send original and one copy of all invoices.
4. Store number and Vendor name must appear on all shipping cases.
5. A separate invoice must be issued for each purchase order.
6. Each invoice must be accompanied by a manifest.
7. Price changes, substitutions in delivery dates, or other deviations will not be accepted without our written consent.
8. Vendor must use Shoe Corp. of America shipping labels on all cases as per our instructions.
9. We reserve the right to return any or all merchandise shipped after the agreed upon delivery date.

BUYER

MERCH. OFFICE

BUDGET

CONDITIONS OF THIS ORDER, ON REVER
SIDE, ARE AN INTEGRAL PART HEREO

FORM NO. 16 234 PRINTED IN U.S.A.

BEST COPY AVAILABLE

NORRWOCK SHOE DIVISION SCOA INDUSTRIES INC

Internal Correspondence

TO Joe Lizotte DATE 6/25/75

FROM Stan Clayman

SUBJECT REQUEST FOR HOLD - CANCELLATION OF EDISON ORDERS - ROLLING BOTTOM

I have just been informed by Jack Schoenfeld that the Wild Pair Division of Edison Brothers is being "sued" by Famolare for selling Famolare type "Get-There" sandals. As it is now known, these sandals were imported and carry an exact duplicate of the "Get-There" bottom. Instructions have come from the President of Edison Brothers to hold all orders and cancel them if possible for any "Get-There" type shoes, whether domestic or imported, until resolution of the "lawsuit." The orders involved for Norrwock are as follows:

ORDER NUMBER	NO. OF CASES
146676	25
146677	15
146678	10
46161	30
46162	10
	90 cases/3240 prs.

Jack has a meeting with the buyer from Edison on Friday, at which time they will attempt to line up alternate shoes utilizing all the materials involved in the "Get-There" shoes with the exception of the bottoms. I recommend an immediate cancellation of these 90 cases of bottoms and a re-slotting of the production space laid out for Edison on these shoes.

Further information will be available on Friday.

Edison is aware that our shoes, as well as other domestic shoes they are buying, carry an indemnification in the U.S.M. letter, but they wish at this time not to proceed with this bottom style any further.

SC/jj

cc: A. V. Federle
A. Sewall
K. Hirshberg

NORRWOCK SHOE DIVISION SCOA INDUSTRIES, INC.

F-116

Internal Correspondence

TO All Salesmen DATE 6/25/75

FROM Stan Clayman

SUBJECT ROLLING BOTTOM INDEMNIFICATION

Per Buzz's wishes, with regards to the above bottom and any other United "Get-There" type bottoms, that we do not get in the business of providing legal advice to any of our accounts. Further, he does not wish the sales force to carry around a letter of indemnification as it could possibly be misinterpreted between buyers and salesmen. What he does wish to do is to have you mention to your account, SHOULD THE ISSUE BE RAISED BY THE CUSTOMER, that we and our accounts are covered by the letter of indemnification provided to us by U.S.M. Corporation on June 3, 1975. Further, if a particular customer wishes a copy of said letter for their own internal interpretation, please advise me and I will be sure a copy is sent for their use.

SC/jj

cc: A. V. Federle

MEMORANDUM

USA 33-4/75
(ED. 4-23-71)

TO: Milt Ross 151a

DEFENDANT

FROM: Abe Thall

DATE: November 7, 1975

SUBJECT: Use of Word "Earth" in Ads or Display

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

We were challenged by the attorneys for Mrs. Kelso, for using the expression "Down-To-Earth" in an ad in our Discount Division.

George Freise recommended we do not use the word "Earth".

We are attaching a copy of a letter that we sent to her attorney.

Please make sure that none of your stores use the word "Earth" in any ads. The same thing applies if they make up any display locally.

AT/tb
Attachment

xc: John Kekich

RM 5
Please follow through
JMR

office
11/20 MMC

EXHIBIT C-1

USA 233-475
(ED. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

United States Patent Office

Re

PRINCIPAL REGISTER
Trademark

Ser. No. 364,614, filed July 8, 1970

THE EARTH SHOE

Kalso Systemet, Inc. (New Jersey corporation)
117 E. 17th St.
New York, N.Y. 10003

For: SHOES, in CLASS 39 (INT. CL. 25).
First use April 1970; in commerce April 1970.
The term "Shoe" is disclaimed apart from the mark as shown.

USA 33s - 475
(ED. 4-23-71)

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

United States Patent Office

PRINCIPAL REGISTER
Trademark

Ser. No. 303,193, filed July 19, 1968

WALLABEES

Padmore & Barnes Limited (Irish corporation)
Wolfe Tone St.
Kilkenny, Ireland

For: FOOTWEAR, in CLASS 39 (INT. CL. 25).
First use April 1968; in commerce Apr. 19, 1968.

8300 SANTA MONICA BLVD.
LOS ANGELES, CALIFORNIA

USA 33-415
(Ed. 4-2-57)

DEFENDANT

"CALENDAR OF EVENTS"
DECEMBER 1975

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

The exciting Christmas Holiday Season is upon us and our I
Calendar is outstanding. All stores must promote the item
this "Calendar of Events" unless instructed otherwise.

Your District or Regional Manager will advise you if you
the "Directed Ads", however, all promotions are "In Store
start on the dates indicated.

Make certain that you display 5 to 6 pairs of these fantastic values in your windows. Let's hear that register ring!!

All "Directed Ads" will run in the LOS ANGELES TIMES on the dates shown below.

Thursday, November 27th thru Sunday, November 30th

MOPS and SCUFFS

7-5127-229 Hot Pink	$2.90	7-5107-235 Black Scuff	$2.90
7-5137-229 Sapphire Blue	$2.90	7-5127-235 Hot Pink Scuff	$2.90
7-5177-229 Purple	$2.90	7-5137-235 Sapphire Blue Scuff	$2.90
		7-5147-235 Sun Gold Scuff	$2.90

WOMEN'S BOOTS

7-0500-471	$14.90
7-0560-471	$14.90

Both of these ads will be run in the LOS ANGELES TIMES on THANKSGIVING DAY, November 27th in the "View Section". New ads will be sent to you in a few days.

Thursday, December 4th thru Sunday, December 7th

"AUSSIE BOOTS"
Family Wallaby Promotion

"SUPER NATURAL"
Earth Shoe Promotion

DO YOUR THING - HAVE IT YOUR WAY

MEN'S

7-1203-476	$12.90	7-1203-262	$12.90
7-1213-476	$12.90	7-1203-462	$12.90
7-1213-478	$12.90	7-1213-262	$12.90
7-1263-476	$12.90	7-1213-462	$12.90
7-1263-262	$12.90	7-1263-462	$12.90

BOY'S

7-2603-476	$11.90	7-2603-442	$11.90
7-2613-476	$11.90	7-2610-456	$11.90
7-2663-476	$11.90	7-2663-442	$11.90

All DM-IM OFFICE Buyers are THIS

11/13 MAIL

EXHIBIT D

YOUTH'S

7-3603-220	$10.90	7-3763-242	$10.90
7-3703-220	$10.90	7-3663-242	$10.90
7-3713-220	$10.90	7-3763-220	$10.90
7-3663-220	$10.90		

An ad will be run in the LOS ANGELES TIMES on Thursday, December 4th in the "Main News Section". A new lay-out will be sent to you, showing both the "AUSSIE" and the "SUPER NATURAL" shoe in one ad.

Thursday, December 11th thru Sunday, December 14th

IMPORTANT!

Ad must be run as copy reads. Any changes must have my approval.

WOMEN'S

7-0330-457	$15.99	Fresno, Northwest, and Northern California
7-0360-457	$15.99	Fresno, Northwest, and Northern California
7-0160-862	$14.90	Southern California, Arizona, and Las Vegas
7-01 -629- series	$14.90	Southern California, Arizona, and Las Vegas

MEN'S DRESS

7-1100-073	$12.90	7-1100-130	$12.90	7-1101-108	$12.90
7-1110-073	$12.90	7-1110-130	$12.90	7-1111-108	$12.90

Both of these ads will be run in the LOS ANGELES TIMES on Thursday, December 11th. The Women's ad will be in the "View Section" and the Men's ad on the "Sports Page".

Thursday, December 18th thru Sunday, December 21st

ASPEN

7-1213-221	$9.90
7-1233-221	$9.90

MEN'S DRESS

7-1101-302	$19.90
7-1111-302	$19.90

Both of these ads will be run in the LOS ANGELES TIMES on Thursday, December 18th. The ASPEN will be on the "Sports Page", and the 302 series will be in the "Main News". A new lay-out will be sent to you in time for the ad.

Sunday, December 21st

"YEAR - END SALE AD"

An ad will be run on Sunday, December 21st in the LOS ANGELES TIMES in the "View Section", however, the "YEAR-END SALE" will start on Thursday, December 18th.

MR/er

156a

OFFICE OF MILT ROSS
GALLENKAMP WEST
8300 SANTA MONICA BLVD.
LOS ANGELES, CALIF.

USA 335-475
(ED. 4-23-71)

DEFENDANT

FEBRUARY 5, 1976

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

PLEASE READ-IMPORTANT

In the future, whenever running ads on the "EARTH TYPE" sh
certain that you do not use the word "EARTH" in any way, a
is registered by another company.

In the past, we have referred to this type of shoe as the "SUPER-NATURAL" shoe and it is advisable to continue to use this term with the approval of your District or Regional Manager.

****

In your recent shipments of tennis shoe boxes, you received some boxes imprinted with the name "SCATS", America's Action Shoe by Gallenkamp. Enclosed in these boxes were plastic bags with the same imprint. When selling a pair of these tennis shoes, please use the "SCATS" bag, rather than our usual shoe bag, as these bags are distinctive and make a marvelous advertising item. You will be receiving more of these bags in the future.

****

After you trim your windows with the new Spring background, be sure all the sale shoes are removed from your windows, along with the sale signs. Please gather together all the remaining sale shoes from the sale racks, tables, and trollys, and display them in the rear of the store. Your sale signs in the interior of the store should be replaced with the new hanging cards which you recently received from our Columbus Office.

****

ATTENTION: ALL MANAGERS

According to information received from our Columbus Office, all payroll checks are mailed at noon on Wednesdays, never later than 4 P.M., and therefore, the late arrival of these checks on some occasions must be due to the Postal Service.

Thankyou,

MR/er

EXHIBIT C-2

USA 33s-475
(Ed. 4-23-71)
DEFENDANT
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
P

IN THE UNITED STATES DISTRICT
FOR THE SOUTHERN DISTRICT OF N

- - - - - - - - - - - - - - - - - - - x

SCOA INDUSTRIES INC., :

Plaintiff, :

v. : Civil Action No.

FAMOLARE, INC., : 75 Civ. 3357

Defendant. : (Judge Wyatt)

- - - - - - - - - - - - - - - - - - - x

AFFIDAVIT OF JOHN O. TRAMONTINE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN O. TRAMONTINE, being duly sworn, states:

1. I am a member of the Bar of the State of New York, a partner in the firm of Fish & Neave, 277 Park Avenue, New York, New York 10017, and one of the attorneys herein for defendant Famolare, Inc.

2. I make this affidavit in support of defendant's application for an Order granting a preliminary injunction restraining plaintiff from infringing defendant's registered trademark "GET THERE".

3. Attached hereto as Exhibit 1 is a copy of page 113 of the transcript of the deposition of Joseph P. Famolare, Jr., President of defendant, taken by plaintiff's attorneys on September 23, 1975.

4. Attached hereto as Exhibits 2 and 3 respectively are a copy of a letter of March 24, 1976 from Mr. Soffen, SCOA's attorney, to me, and a copy of my letter of that same date to Mr. Soffen. This morning (March 25, 1976) Mr. Soffen and I

had a telephone conversation in which I offered to stipulate to an adjournment of the date of the hearing on the application to April 2, 1976, if he would agree to produce Messrs. Anderson, Ross and Thall at the adjourned hearing. Mr. Soffen did not accept my offer.

John O. Tramontine

Subscribed and sworn to
before me this 25th day
of March, 1976.

Notary Public

LORRAINE M. PAPP
Notary Public, State of New York
No. 03-0271055
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1978

Q And the next two figures, where there is the designation, "When standing rocking body stretches front and back muscles," refers to standing; right?

A Yes, sir.

Q And the designation, "Get There," is used by you on all of these shoes, is it not?

A Yes, sir.

Q Does, "Get There," refer to walking or standing?

A You can be a very successful man sitting or standing, I notice.

Q Yes, and is that what you mean by that expression, "Get There"?

A Yes, "Get There" is a mood.

Q Is what, sir?

A It's a mood. It's an attitude.

Q I see, and this means to you either standing or walking, when you say, "Get There"?

A Yes. I'm sure there are a lot of people who are very successful beauticians, and they're getting there.

Q I see, and that's what, "Get There" means?

A "Get There," is positive in a time when we need to be positive.

OSTROLENK, FABER, GERB & SOFFEN
ATTORNEYS AT LAW
260 MADISON AVENUE
NEW YORK, N.Y. 10016

SAMUEL OSTROLENK
1898-1968

SIDNEY G. FABER
BERNARD GERB
MARVIN C. SOFFEN
SAMUEL H. WEINER
JEROME M. BERLINER
LOUIS WEINSTEIN
ROBERT C. FABER
EDWARD A. MEILMAN
STANLEY H. LIEBERSTEIN

PATENTS
TRADE MARKS
RELATED CAUSES

TELEPHONE
(212) 685-8470

CABLE
OSTROFABER NEW YORK

TELEX
23 6925

March 24, 1976

RECEIVED
MAR 24 1976
FISH & NEAVE
REFERRED TO JOT
NOTED BY

BY HAND

John O. Tramontine, Esq.
Fish & Neave
277 Park Avenue
New York, New York 10018

Re: Scoa Industries Inc. v. Famolare, Inc.

Dear Mr. Tramontine:

This is to acknowledge the telephone request you made today shortly before noon to the effect that you now wish to have us produce Messrs. Ross, Thall and Anderson as witnesses at the hearing scheduled for Friday afternoon.

You originally noticed the depositions of these same witnesses on March 11, 1976. Then you stated you would like to inspect documents first; whereupon you adjourned the depositions sine die. The documents were produced expeditiously. Now, on two days' telephone notice, you seek to have us bring these witnesses to the courthouse in New York. We do not believe that your desire, in this New York patent action, to insert a counterclaim which is not compulsory, and is based on a single alleged act of trademark infringement in California, provides a proper basis for these tactics.

The witnesses sought are employees, not officers or managing agents, of SCOA. As I indicated to you prior to your adjournment of the depositions, you were free to take their depositions where they are located, Messrs. Ross and Anderson both being in California.

OSTROLENK, FABER, GERB & SOFFEN

Your request that these three witnesses come to New York on 48-hour notice, after having had their affidavits since March 4th, can only result in unjustified expense and harassment of our client. Again, we offer to make these witnesses available to you at their respective business locations.

Very truly yours,

Marvin C. Soffen

MCS:ef

FISH & NEAVE

277 PARK AVENUE
NEW YORK, N. Y. 10017
TELEPHONE: (212) 826-1050
TELEX: 12-5806
CABLE ADDRESS: FISHNEAVE

W. PHILIP CHURCHILL
HARRY R. PUCH, JR.
RYNN BERRY
WILLIAM K. KERR
JOHN FARLEY
HENRY J. ZAFIAN
LOUIS T. FEED
CHARLES B. SMITH
DONALD E. DEGLING

DAVID W. PLANT
ALBERT E. FEY
JOHN O. TRAMONTINE
HERBERT F. SCHWARTZ
LARS I. KULLESEID
WILLIAM J. GILFILLETH
ERIC C. WOGLOM
JOHN E. NATHAN
JOHN A. HOWSON

JAMES D. BOCK
ROBERT C. MORGAN
KENNETH B. HERMAN
ALFRED L. MICHAELSEN
EDWARD F. MULLOWNEY
GARY A. WALPERT
ROBERT R. JACKSON
DALE LISCHER
HUGH C. BARRETT
JESSE J. JENNER

JOHN W. SCHLICHER
RONALD A. SCHAFFA
EUGENE M. KOTLARCHUK
W. EDWARD BAILEY
RUSSELL J. BARRON
ROY H. WEPNER
BARBARA J. DILL
ELMER W. HANAN III
RICHARD M. GAINES
JOHN A. CARUSO

OF COUNSEL
ALEXANDER C. NEAVE

FREDERICK P. FISH
(1855-1930)
CHARLES NEAVE
(1867-1937)
FISH, RICHARDSON & NEAVE
NEW YORK
(1916-1969)

March 24, 1976

By Hand

Marvin C. Soffen, Esq.
Ostrolenk, Faber, Gerb & Soffen
260 Madison Avenue
New York, New York 10016

Scoa Industries Inc. v. Famolare, Inc.

Dear Mr. Soffen:

Your letter of March 24, 1976, which I received this afternoon, does not accurately set forth what has transpired nor does it reflect the substance of my statements to you during our telephone conversation this morning.

On March 11, 1976 we served by hand on you notices to take the oral depositions with requests for documents, here at our offices on March 16 and 17, 1976, of the following:

> Larry Anderson, Manager of your client's Visalia, California, store
>
> Milton M. Ross, Operations Manager for the West Coast operations of Gallenkamp's Shoes, a division of your client
>
> Abe Thall, Manager of Advertising, Sales Promotion And Display for Shoe Corporations of America, the Retail Footwear Division of your client.

Each of the above persons submitted affidavits in opposition to our pending motion. Furthermore, each of the above persons clearly is a managing agent for your client, as proclaimed by their titles, contrary to the statement in your March 24th letter.

FISH & NEAVE

TO Marvin C. Soffen, Esq.

FOLIO 2

March 24, 1976

As stated in the Stipulation And Order signed by Judge Wyatt on March 17, 1976, plaintiff SCOA could not make the documents we requested in aid of that deposition available until at least March 22, 1976. On that basis, we agreed orally to adjourn our depositions of Messrs. Anderson, Ross and Thall until those documents were available. At that time I told you that we might wish to have Messrs. Anderson, Ross and Thall appear at the hearing before Judge Wyatt, but this was subject to our review of those documents.

On Monday, March 22, I reviewed a number of the documents at your office, asked for copies of those documents and pointed out to you that a number of the documents that we had requested had not been produced. You undertook to look into the matter of the missing documents.

Yesterday noon, we received copies of the documents you had produced for our inspection. Not having heard from you yesterday, I called this morning to inquire into the status of the missing documents and to request that Messrs. Anderson, Ross and Thall appear at the hearing this Friday before Judge Wyatt. You informed me that you did not have the missing documents and refused to produce the affiants, notwithstanding that you had not checked into their availability.

I informed you that the issues to be decided on our pending motion involved the credibility of Messrs. Anderson, Ross and Thall and that the Court should have an opportunity to hear their testimony and judge their credibility. I stated that you could consider our request as an adjournment of our notices of taking the depositions of these affiants to Judge Wyatt's courtroom at 2:30 this Friday or as a demand for the appearance at the hearing of the persons whose affidavits your client submitted to the Court. Your response, as confirmed by your letter, was to offer to take those depositions, not in New York as noticed, but in Visalia, California, Los Angeles, California, and Columbus, Ohio, where those affiants respectively are employed.

FISH & NEAVE

TO——Marvin C. Soffen, Esq.

FOLIO——3

March 24, 1976

I call your attention to the fact that in Rodriguez v. Sklar, 293 F.Supp. 1013 (S.D.N.Y. 1968), Judge Wyatt declined to rule on a motion for a preliminary injunction and ordered an evidentiary hearing. Also, the Court of Appeals for this Circuit has held that it is reversible error to not have an evidentiary hearing on a motion for a preliminary injunction where there are issues of fact to be resolved and where credibility is involved. Dopp v. Franklin National Bank, 461 F.2d 873 (2 Cir. 1972); Securities And Exchange Commission v. Frank, 388 F.2d 486 (2 Cir. 1968). Finally, the general rule is that a defendant is entitled to examine a plaintiff in the forum where plaintiff has chosen to sue. See for example Seuthe v. Renwal Products, Inc., 38 F.R.D. 323 (S.D.N.Y. 1965), where Judge Feinberg ordered the plaintiff to travel 3,000 miles from his residence in Germany for his deposition in New York.

After receiving your letter, I attempted to call you at 5:30 this evening, but you had left for the day. Accordingly, I am having this letter delivered by our messenger at 9 o'clock tomorrow morning.

I would appreciate it if you would reconsider your position on this matter and let me know if you adhere to that position or if you will produce the affiants at the hearing. I will then advise Judge Wyatt's Law Clerk accordingly in advance of the hearing so that our motion can be scheduled accordingly. Regardless of whether the affiants appear, I ask that you produce the attached list of missing documents for inspection.

Very truly yours,

John O. Tinnelli

JOT/jm

Attachment

Scoa v. Famolare

LIST OF MISSING DOCUMENTS

1. The complete MATS catalog from which Mr. Anderson tore out the picture, referred to in paragraph 6 of his affidavit.

2. The pre-printed text which Mr. Anderson used, referred to in paragraph 6 of his affidavit.

3. All slicks in the possession of Mr. Anderson.

4. A complete fall and winter 1975 MATS catalog.*

5. A complete spring and summer 1975 MATS catalog.*

6. If distributed to store managers before January 22, 1976, a complete spring and summer 1976 MATS catalog.*

7. All pre-printed texts accompanying the above catalogs.*

8. The payment of the Visalia Times Delta bill.

9. The tear sheet accompanying the Visalia Times Delta bill.

10. The other Calendar of Events for Gallenkamp East and for Gallenkamp West (we have Gallenkamp West for December 1975 and January 1976).

11. The slick identified as GK West FL 01-75 in the Gallenkamp West Calendar of Events for January 1976.

12. The two ads referred to in Ross Exhibit D on page 2 for December 11 - December 14.

13. The layout attached to Exhibit A of the Ross affidavit.

14. All of the advertisements referred to in the first line of paragraph 4 of the Ross affidavit.

15. The advertisement that appeared in the Columbus Dispatch in Columbus, Ohio, on December 10, 1975 referred to in SCOA's answer to our interrogatory No. 4(b) and said to be attached.

---

* If there are separate catalogs and pre-printed texts for Gallenkamp East and for Gallenkamp West, both of them.

FISH & NEAVE

277 PARK AVENUE
NEW YORK, N. Y. 10017

TELEPHONE: (212) 826-1050
TELEX: 12-5806
CABLE ADDRESS: FISHNEAVE

W. PHILIP CHURCHILL
HARRY R. PUGH, JR.
RYNN BERRY
WILLIAM K. KERR
JOHN FARLEY
HENRY J. ZAFIAN
LOUIS F. REED
CHARLES B. SMITH
DONALD E. DEGLING

DAVID W. PLANT
ALBERT E. FEY
JOHN O. TRAMONTINE
HERBERT F. SCHWARTZ
LARS I. KULLESEID
WILLIAM J. GILBRETH
ERIC C. WOGLOM
JOHN E. NATHAN
JOHN A. HOWSON

JAMES D. BOCK
ROBERT C. MORGAN
KENNETH B. HERMAN
ALFRED L. MICHAELSEN
EDWARD F. MULLOWNEY
GARY A. WALPERT
ROBERT R. JACKSON
DALE LISCHER
HUGH C. BARRETT
JESSE J. JENNER

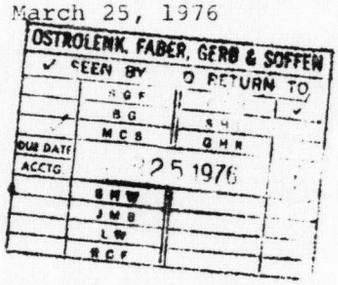
JOHN W. SCHLICHER
RONALD A. SCHAPIRA
EUGENE M. KOTLARCHUK
W. EDWARD BAILEY
RUSSELL J. BARRON
ROY H. WEPNER
BARBARA J. DILL
ELMER W. HANAK III
RICHARD M. BARRETT
JOHN A. CARUSO

OF COUNSEL
ALEXANDER C. NEAVE

FREDERICK P. FISH
(1855-1930)
CHARLES NEAVE
(1867-1937)

FISH, RICHARDSON & NEAVE
NEW YORK
(1918-1969)

March 25, 1976



By Hand

Marvin C. Soffen, Esq.
Ostrolenk, Faber, Gerb & Soffen
260 Madison Avenue
New York, New York 10016

Scoa v. Famolare

Dear Mr. Soffen:

This will confirm the two telephone discussions we had this afternoon.

You advised me that Messrs. Anderson, Ross and Thall would not appear at the hearing tomorrow afternoon. I advised you that we would have one witness. Her name is Paula Shepherd and she will testify that your Visalia store palmed off your client's shoe as a "Get There" shoe.

Very truly yours,

JOT/jm

Community News

farm

AND AGRI-BUSINESS

12-B — Visalia, Calif., Times-Delta — Thursday, January 22, 1976

USA 336-475
(I.D. 4-23-71)

167a

DEFENDANT

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

Q

TIMES-DELTA CLASS

SPECIAL

LIMITED TIME ONLY

LADIES'

SPORT OXFORDS

WITH GET THERE SOLE

Super comfortable go anywhere shoe in three colors . . . black, navy blue and tan. Sizes 5-10.

SAVE $6.00
Regularly $15.99

9.90

OTHER MARK DOWNS THROUGHOUT THE STORE

Gallenkamp
THE FAMILY SHOE STORES
VISALIA FAIR SHOPPING CENTER

(6)

FILE COPY

in connection with this mark

BEST COPY AVAILABLE

FINDINGS OF FACT

1. Plaintiff, SCOA Industries Inc. (hereinafter "SCOA"), is a Delaware Corporation and has its principal place of business in Columbus, Ohio. (Complaint, Para. 1).

2. Defendant, Famolare, Inc. (hereinafter "Famolare"), is a Delaware Corporation having its principal place of business in New York, New York. (Complaint, Para. 2; Answer, Para. 2).

3. Famolare seeks a Preliminary Injunction restraining SCOA from infringing Famolare's registered trademark "Get There" for shoes.

4. On March 25, 1975, Registration No. 1,007,435 was issued by the United States Patent And Trademark Office to Famolare for the registration on the Principal Register ofthe trademark "Get There and Design" for shoes. (DX-F*, Para. 2; Sixth Counterclaim, Para. 52). That registration is prima facie evidence of the validity of the registration, Famolare's ownership of the mark and of Famolare's exclusive right to use the mark in commerce in connection with shoes. 15 U.S.C. § 1057(b). No contrary evidence was adduced by SCOA.

5. Famolare first used the trademark "Get There" in March 1974 on and in connection with its promotion and sale of its shoes having wavy bottom soles. Since that time, Famolare has promoted and sold its "Get There" shoes throughout the United States. (DX-F, Para. 2).

6. Famolare's sales now are about $30,000.00 per year, approximately half of which are sales of "Get There" shoes. Approximately 20% of Famolare's sales are to retail outlets in California. (DX-F, Para. 3).

---

* Defendant's Exhibits referred to as DX- : transcript of hearing on March 26, 1976 as Hearing Tr. ___.

7. Famolare has conducted a nationwide campaign to advertise its "Get There" trademark associated with its shoes having wavy bottom soles. That advertising has been by radio, television, newspapers, magazines, trade brochures and trade shows. In 1975, Famolare spent approximately $100,000 in nationally oriented advertising and approximately $200,000 in regionally oriented advertising. The majority of those advertising expenditures were for "Get There" shoes. (DX-F, Para. 4; Hearing Tr. 50).

8. Famolare's "Get There" shoes have been sold in Visalia, California, since November 1974 by the two retail shoe stores of Dick Parker Shoes. The "Get There" shoes were advertised in Visalia on the local UHF television station for one month to introduce the shoes an in the local newspaper, the Visalia Times Delta at least once a month. (Hearing Tr. 6; DX-H, Para. 3).

9. The majority of the people who come into the Dick Parker Shoes stores and purchase "Get There" shoes ask for them by the name "Get There". Those shoes are asked for by the "Get There" trademark approximately 5 to 7 times a day. The "Get There" shoe is the largest selling shoe of Dick Parker Shoes. (Hearing Tr. 6-7; DX-H, Para. 4).

10. SCOA owns a retail shoe store in Visalia which does business under the name Gallenkamp Shoe Store. (DX-H, Para. 5; Hearing Tr. 7). On January 22, 1976, SCOA's Gallenkamp Shoe Store ran an advertisement in the Visalia Times Delta for a SCOA shoe "WITH GET THERE SOLE". (DX-Q; DX-F, Para. 7).

11. On February 6, 1976, an employee of Dick Parker Shoes, Mrs. Paula Shepherd, was sent by her employer to purchase wavy sole shoes at the Gallenkamp store in Visalia. At her request, the Gallenkamp shoe salesman wrote the name "Get ~~There~~" on the box for the SCOA shoes that he sold Mrs. Shepherd.

(Hearing Tr. 7-13 and 35; DX-A; DX-B; DX-C). Some of her testimony was corroborated by the affidavit of Melinda Morris who was with Mrs. Shepherd on that occasion. (DX-E).

12. The SCOA and Famolare shoes differ in quality and they differ in price. (Hearing Tr. 50). The "Get There" shoe was leather and the SCOA shoe was vinyl. (Hearing Tr. 14).

13. SCOA, including its Norrwock Shoe Division and Norrwock Shoe Company, has used "Get There" only in internal correspondence. (DX-J; Hearing Tr. 50 and 56-7).

14. SCOA in its complaint alleged that Famolare had charged SCOA with infringement of Famolare's Design Patent 235,701 and also with infringement of unspecified trademarks and copyrights of Famolare, and had threatened customers and prospective customers of SCOA or its associates with legal action for the alleged infringement. SCOA sought a declaratory judgment that the Design Patent be declared invalid and not infringed and that Famolare has no proprietary trademark or copyright rights that are valid, enforceable and infringed by SCOA, directly or indirectly.

15. On the basis of the Cislini affidavit, to the effect that he does "not recall Mr. Larry Anderson telling me not to use the name 'Get There' in the advertisement", this Court finds that the store manager of the shoe store in Visalia told the promotion manager of the Visalia Times Delta to use the name "Get There" in the advertisement, and that such act constitutes trademark infringement. (Hearing Tr. 43 and 49). The advertisement was not submitted to the store manager for final approval before publication because it was too small (Cislini affidavit of March 2, 1976, p. 2).

16. Although SCOA has hundreds of shoe stores, only one store located in the small California town of Visalia is involved. (Hearing Tr. 49, 56, 42). That store's manager is neither an officer nor a manager of SCOA. (Hearing Tr. 49). There is no evidence of the public use of "Get There" other than the single advertisement in the Visalia Times Delta, and an oral statement by one Visalia shoe salesman. The Visalia shoe store does not display any sign, poster, or anything with the words "Get There". (Hearing Tr. 8). Nevertheless, the Court finds that the damage done to defendant is irreparable.

17. Famolare has sued Edison Brothers Shoes, Inc. and USM Corporation alleging, inter alia, infringement of its Design Patent 235,701, in the United States District Court, Northern District of Illinois, Eastern Division No. 75 C 2708. In that case, on or about September 19, 1975, Judge Hubert S. Will entered an agreed order enjoining Famolare, Inc., its officers, employees, agents, servants, attorneys and all persons in active concert or participation with them for publicising information regarding its claims of liability except for an agreed Press Release (Hearing Tr. 45, 46). The potential harm to SCOA in granting a Preliminary Injunction in this case would flow from adverse publicity. (Hearing Tr. 45). Defense counsel's statement at the hearing before this Court indicates the probability that Famolare will issue a press release relative to this matter unless this Court orders that it not be done. (Hearing Tr. 45, 46). Such publicity would do unjustified and incalculable harm to SCOA's reputation, particularly in view of the fact that an act at only one of SCOA's hundreds of stores has been complained about, and should not be permitted.

AFFIDAVIT OF DENNIS S. MORENO, JR.

STATE OF CALIFORNIA)
) ss.:
COUNTY OF TULARE)

I, DENNIS S. MORENO, JR., being duly sworn deposes and says:

1. I am a shoe salesman in Gallenkamp's store at 2129 South Mooney Boulevard, Visalia, California in the Visalia Fair Shopping Center.

2. I am 24 years of age, and have been employed in the Gallenkamp store since August 1975.

3. I have been informed of the testimony of Paula Shepherd concerning her purchase of a wavy sole shoe in our store on Friday, February 6, 1976, and can recall that I was the salesman who waited on Mrs. Shepherd and sold her the wavy sole shoe which was the subject of her testimony.

4. Mrs. Shepherd has been identified to me by my co-worker, Mr. Ernest Coronado, who recognized her when she entered the store, as Mr. Coronado had earlier worked with her when she was employed at J.C. Penney.

5. I first saw Mrs. Shepherd enter the store, look around, and leave without buying anything. A few minutes later she entered the store again, pointed to the wavy sole in the window and asked me "is that the Get There shoe". I did not volunteer the use of the name "Get There", inasmuch as we do not advertise or display our wavy sole shoe at being a "Get There" shoe.

6. When Mrs. Shepherd asked for the "Get There" shoe, I replied that we do not have this particular brand but we have something like it. She then purchased a pair of wavy sole shoes, and when she was paying for them she asked if I would write the name of the shoe she had asked for on the box because she wanted to know what to call it when she went to look for it elsewhere. I acted according to her request, although I was not sure of the spelling of the name.

Dennis S. Moreno Jr.
DENNIS S. MORENO, JR.

Subscribed and sworn to
before me this 6th day
of April 1976.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SCOA INDUSTRIES INC.	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

AFFIDAVIT OF EDWARD A. MEILMAN

STATE OF NEW YORK :
: ss.:
COUNTY OF NEW YORK :

EDWARD A. MEILMAN, being duly sworn, deposes and says:

1. I am a member of the bar of the State of New York and of this Court. I am also a member of the law firm of OSTROLENK, FABER, GERB & SOFFEN, counsel for SCOA Industries Inc.

2. On April 16, 1976, our office received a telephone call which was routed to me. The caller identified himself as Bill Eisenberg of Footwear News, a trade publication. Mr. Eisenberg told me that he had been reviewing the Court's records and inquired whether Mr. Anderson, the store manager of the Visalia shoe store, had submitted an affidavit in connection with this matter. On information and belief, no one contacted Footwear News on behalf of SCOA.

Edward A. Meilman
Edward A. Meilman

Sworn to before me this
20th day of April 1976

Notary Public

ROBERT C. FABER
Notary Public, State of New York
No. 03-6219596
Qualified in Bronx County
Commission Expires March 30, 19....

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SCOA INDUSTRIES INC.	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.,	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

MEMORANDUM IN SUPPORT OF FINDINGS OF FACT PROPOSED BY PLAINTIFF

Defendant has submitted Findings of Fact and Conclusions of Law which are unjustified and unsupported by the record. Plaintiff is, therefore, submitting herewith proposed Findings of Fact and Conclusions of Law which are supported.

Defendant's trademark registration shows the words "Get There" and an arrow. Therefore, paragraph 4 of the Findin; is for "Get There and Design". (See DX-F).

Defendant's Exhibit DX-H does not establish that the "Get There" shoes were "extensively" advertised but it does show that television ads were run "for one month to introduce the shoes" and that ads in the local newspaper were placed at least once a month. Plaintiff's proposed Finding No. 8 accurat reflects this evidence while defendant's does not.

Mrs. Shepherd testified that the name was written on the shoe box at her request. Defendant's proposed Finding No. 11 does not reflect this testimony; plaintiff's finding do

Also, while the Morris affidavit corroborates some of Mrs. Shepherd's testimony, it does not "fully" corroborate it, and plaintiff's proposed finding reflects this fact.

Defendant's proposed Finding No. 12 misrepresents the testimony and the Court's remarks during the hearing of March 26, 1976. The Court rejected defendant's contention that Mrs. Shepherd was sold a "Get There" shoe saying:

> "Whatever it may be, it's not palming-off"
>
> (Hearing Tr. 35)

Moreover, the principal issue to be tried in this litigation involves patent infringement. The trademark issue does not involve the question of whether the SCOA shoe is a "close copy" of the Famolare' shoe, but the patent issue involves this question. Defendant's proposal attempts to "slip in" a patent issue finding under the disguise of being relevant to the Court's present determination, which it is not.

Defenant's proposed Finding No. 12 is also in error in asserting that the Court found that the SCOA shoe was of inferior quality and sold at a significantly lower price without the benefit of any expert testimony on this point. The Court simply said:

> "...the shoes differ in quality, they differ in price...." (Hearing Tr. 50).

Plaintiff's proposed Finding No. 13 omits the second and third sentences of defendant's proposal. Page 56 of the transcript makes it clear that the Court's comments at pages 57-58 refer to SCOA's internal use of the words "Get There" and, therefore, defendant has expanded beyond what the Court said into an area irrelevant as to this Motion.

Plaintiff's proposed Finding No. 14 omits the second sentence of the defendant's formulation. The omitted sentence in addition to being irrelevant, has the Court making a value judgment which the Court was not asked to make or did make. The remaining sentence has been revised to make it more accurate and informative.

The Finding No. 15 by defendant is totally irrelevant to the issue before the Court except in stating that the local store manager placed the advertisement in the newspaper. The purpose of Findings is to set forth what the Court has found the facts to be and not to rehash the opposing contentions of the parties, e.g., Anderson's deposition was noticed but not taken by defendant, although the witness was available for this purpose. Plaintiff's proposed Finding No. 15 merely recites the facts found by the Court and omits the arguments of the parties. The fact that Cislini's affidavit states only that he does not recall the Store Manager, Anderson, telling him not to use "Get There" is recited in plaintiff's Finding No. 15,

which also includes the fact that the ad in issue was not sent to Anderson for proofing because it was so small (Cislini Affid. of March 2, 1976, p. 2).

Defendant's proposal for paragraph 16 of the Findings of Fact has been deleted because it is a conclusion of law and, moreover, is inaccurate since the Court found that the store manager placed the newspaper advertisment, not SCOA.

Defendant's Paragraph 17 has the Court reject testimony that was not given and hold that the absent testimony would not affect the Court's evaluation of testimony that was given. Defendant's formulation also has the Court saying that a continuance was denied because the Court is, without hearing it, rejecting the testimony not given. In actual fact, the Court said with respect to the testimony not given:

> "I am prepared to hearing it." (Hearint Tr. 51)
> "Well, of course it's relevant. I'd like to be able to accommodate you. If I had my way and could schedule by own calendar and deal with matters as I see fit, of course I'd try to accommodate you." (Hearing Tr. 53).

Because of defendant's tardy identification of Mrs. Shepherd to plaintiff, it was only possibly to identify the salesman involved at a time when it was too late to be able to bring him from California to New York for the hearing. As the Court will observe from the affidavit of the salesman, Mr. Moreno, submitted herewith, his testimony was indeed relevant and impeached Mrs.

Shepherd. Thus, Mr. Moreno states that Ernie was in the store although Mrs. Shepherd says that he was not (Hearing Tr. 17-19) and that Mrs. Shepherd specifically used the words "Get There" in asking for the shoes. In the interests of justice, it is respectfully submitted that the Court should have granted the continuance in order to hear the salesman.

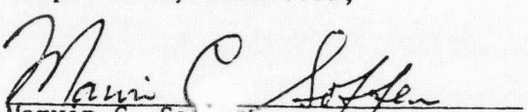
Plaintiff's proposed Findings include two paragraphs which are not present in the defendant's submission. The first is a holding that even though only one of the hundreds of SCOA stores was involved (Hearing Tr. 49 and 56), the advertisement was placed by that store's manager who was neither an officer or manager of SCOA (Hearing Tr. 49), and even though defendant did not introduce any evidence of public use of "Get There" either before the advertisement or subsequent to the advertisement, the damage suffered by defendant is irreparable. Such a finding is a necessary holding before a Preliminary Injunction can issue.

The second new finding proffered by plaintiff relates to publicity. It was pointed out that the potential harm to SCOA in granting an injunction would come from the attendant adverse publicity (Hearing Tr. 45; the Meilman affidavit submitted herewith shows that this is not just an abstract assertion on behalf of SCOA). Since the granting of a Preliminary Injunction requires a balancing of the harm done to the opposing parties, a finding should be made. Additionally, defense counsel's remarks made it

clear that defendant may issue a press release unless the Court orders otherwise (Hearing Tr. 45-46). The proposed finding, therefore, sets the basis for the Court to limit the adverse effect by way of publicity which will result from the granting of this Injunction.

It is submitted that under all of the circumstances of this case and the applicable law, plaintiff's proposed Findings of Fact are more appropriate.

Respectfully submitted,



Marvin C. Soffen
Edward A. Meilman
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Attorneys for plaintiff
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New York, New York 10016
(212) 685-8470

Of Counsel:

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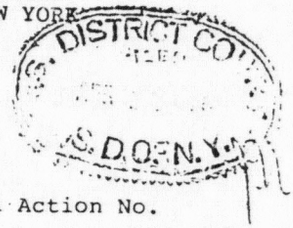
DOWELL & DOWELL
2001 Jefferson Davis Highway
Arlington, Virginia 22202

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



[illegible]STRIES INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.,	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

PRELIMINARY INJUNCTION

For the reasons stated in the findings of fact and conclusions of law entered herewith:

IT IS HEREBY ORDERED that plaintiff, SCOA Industries Inc., its officers, agents, servants, employees and those persons in active concert or participation with them are enjoined, until entry of final judgment in this action, from:

(1) Using the trademark "GET THERE" or any reproduction, counterfeit, copy or colorable imitation thereof, orally or in writing, in connection with the sale, offering for sale, distribution, or advertising of shoes ~~or shoe products, or any other goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive;~~

(2) Applying the trademark "GET THERE" or any reproduction, counterfeit, copy or colorable imitation thereof to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale, offering for sale, distribution, or advertising of shoes ~~or shoe products or any other goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake or to deceive;~~

(48)

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(3) Using the trademark "GET THERE" either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to shoes or shoe products or any other goods or services, to cause confusion or to cause mistake or to deceive;

(4) Selling shoes not made by defendant to any person who asks for shoes by the name "GET THERE", unless before selling those shoes plaintiff has told that person that those shoes are not "GET THERE" shoes; and

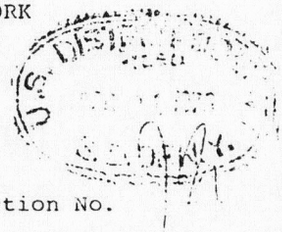
(5) Otherwise infringing defendant's trademark "GET THERE" for shoes.

IT IS FURTHER ORDERED that defendant shall give security in the sum of $1250 for the payment of such costs and damages as may be incurred or suffered by plaintiff if plaintiff is found to have been wrongfully enjoined by this Preliminary Injunction.

Dated: New York, New York
April 21, 1976

Inger B Weyatt
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



SCOA INDUSTRIES INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No.
FAMOLARE, INC.,	:	75 Civ. 3357
Defendant.	:	(Judge Wyatt)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on to be heard on defendant's application for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings, affidavits, testimony and exhibits received in evidence at the hearing on that application, and the parties having been duly heard on that application, and it appearing to the Court that defendant has shown that it has a reasonable likelihood of ultimately prevailing on the merits of its counterclaim for infringement of its registered trademark "Get There" for shoes and that it may suffer greater irreparable injury from the denial of injunctive relief than any hardship to the plaintiff from the granting of such relief, the Court grants defendant's application for a preliminary injunction and makes the following findings of fact to demonstrate the basis for this Court's conclusion that a preliminary injunction should be granted:

MICROFILM

BEST COPY AVAILABLE

FINDINGS OF FACT

1. Plaintiff, SCOA Industries Inc. (hereinafter "SCOA"), is a Delaware Corporation and has its principal place of business in Columbus, Ohio. (Complaint, Para. 1).

2. Defendant, Famolare, Inc. (hereinafter "Famolare"), is a Delaware Corporation having its principal place of business in New York, New York. (Complaint, Para. 2; Answer, Para. 2).

3. Famolare seeks a Preliminary Injunction restraining SCOA from infringing Famolare's registered trademark "Get There" for shoes.

4. On March 25, 1975, Registration No. 1,007,435 was issued by the United States Patent And Trademark Office to Famolare for the registration on the Principal Register of the trademark "Get There" for shoes. (DX-F*, Para. 2; Sixth Counterclaim, Para. 52). That registration is prima facie evidence of the validity of the registration, Famolare's ownership of the mark and of Famolare's exclusive right to use the mark in commerce in connection with shoes. 15 U.S.C. § 1057(b). No contrary evidence was adduced by SCOA.

5. Famolare first used the trademark "Get There" in March 1974 on and in connection with its promotion and sale of its shoes having wavy bottom soles. Since that time, Famolare has promoted and sold its "Get There" shoes throughout the United States. (DX-F, Para.2).

6. Famolare's sales now are about $30,000,000 per year, approximately half of which are sales of "Get There" shoes. Approximately 20% of Famolare's sales are to retail outlets in California. (DX-F, Para. 3).

---

* Defendant's Exhibits referred to as DX- ; transcript of hearing on March 26, 1976 as Hearing Tr. __.

7. Famolare has conducted a nationwide campaign to advertise its "Get There" trademark associated with its shoes having wavy bottom soles. That advertising has been by radio, television, newspapers, magazines, trade brochures and trade shows. In 1975, Famolare spent approximately $100,000 in nationally oriented advertising and approximately $200,000 in regionally oriented advertising. The majority of those advertising expenditures were for "Get There" shoes. (DX-F, Para. 4; Hearing Tr. 50).

8. Famolare's "Get There" shoes have been sold in Visalia, California, since November 1974 by the two retail shoe stores of Dick Parker Shoes. The "Get There" shoes were extensively advertised in Visalia on the local television station and in the local newspaper, the Visalia Times Delta. (Hearing Tr. 6; DX-H, Para. 3).

9. The majority of the people who come into the Dick Parker Shoes stores and purchase "Get There" shoes ask for them by the name "Get There". Those shoes are asked for by the "Get There" trademark approximately 5 to 7 times a day. The "Get There" shoe is the largest selling shoe of Dick Parker Shoes. (Hearing Tr. 6-7; DX-H, Para. 4).

10. SCOA owns a retail shoe store in Visalia which does business under the name Gallenkamp Shoe Store. (DX-H, Para. 5; Hearing Tr. 7). On January 22, 1976, SCOA's Gallenkamp Shoe Store ran an advertisement in the Visalia Times Delta for a SCOA shoe "WITH GET THERE SOLE". (DX-Q; DX-F, Para. 7).

11. On February 6, 1976, a salesman at SCOA's Gallenkamp Shoe Store in Visalia orally misrepresented to Mrs. Paula Shepherd that the name of SCOA's shoe with a wavy sole was "Get There" and wrote that name (misspelled) on the box for the

SCOA shoes that he sold to Mrs. Shepherd. (Hearing Tr. 7-13 and 35; DX-A; DX-B; DX-C). Mrs. Shepherd is a credible witness and her testimony is accepted as true. (Hearing Tr. 51). Her testimony was fully corroborated by the affidavit of Melinda Morris who was with Mrs. Shepherd on that occasion. (DX-E).

12. The SCOA shoe sold to Mrs. Shepherd as a "Get There" shoe was a close copy of Famolare's "Get There" shoe. (Cf. DX-B and DX-D). But the SCOA shoe was of inferior quality and sold at a significantly lower price than Famolare's "Get There" shoe. (Hearing Tr. 13-15 and 50; DX-F, Para. 10; DX-Q).

13. SCOA, including its Norrwock Shoe Division and Norrwock Shoe Company, has used "Get There" in internal correspondence to designate SCOA shoes having wavy bottom soles. (DX-J; Hearing Tr. 50 and 56-7). SCOA has made internal use of registered trademarks of other shoe companies in a similar fashion. (DX-K through DX-O; Hearing Tr. 33-8). The internal use by SCOA of trademarks belonging to others leads to incidents such as occurred in Visalia, California. (Hearing Tr. 57-8).

14. SCOA in its complaint seeks a declaratory judgment that Famolare has no proprietary trademark rights that are valid, enforceable and infringed by SCOA directly or indirectly. (Complaint, prayer for relief B). SCOA, in deposing Famolare's President, attempted to establish (without success) that the name "Get There" was descriptive for shoes and therefore an invalid trademark. (DX-P, Para. 3).

15. SCOA submitted the affidavits of the manager and assistant manager of its Gallenkamp Shoe Store in Visalia, California. Those affidavits stated in substance that the promotion manager of the Visalia Times Delta had been told orally by that Gallenkamp store manager not to use the name "Get There"

in the advertisement to be published on January 22, 1976. The affidavits of the promotion manager of the Visalia Times Delta impeach the credibility of those SCOA affidavits. (Cislini affidavit submitted by SCOA; DX-G; DX-I; Hearing Tr. 32-3). Famolare requested SCOA to produce that store manager (and two other SCOA managers whose affidavits were submitted by SCOA) for cross-examination at the hearing on this application for a preliminary injunction. ~~Notwithstanding that those affiants could have been produced at that hearing,~~ SCOA refused to do so. (DX-P, Para. 4; Hearing Tr. 27). This Court finds that the store manager told the promotion manager of the Visalia Times Delta to use the name "Get There" in the advertisement and did so deliberately, ~~and that the contrary SCOA affidavits are not credible.~~ (Hearing Tr. 42-45 and 49).

16. SCOA has deliberately infringed Famolare's "Get There" trademark. (Hearing Tr. 48-9 and 55).

17. SCOA sought to continue the hearing to call the Galienkamp salesman who sold SCOA shoes to Mrs. Shepherd as "Get There" shoes. Even if that salesman would have contradicted the testimony of Mrs. Shepherd (SCOA did not represent that he would), such testimony would not change this Court's finding that Mrs. Shepherd's testimony was credible and true or this Court's finding that SCOA deliberately infringed Famolare's "Get There" trademark. Accordingly, the continuance was denied.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter. 28 U.S.C. § 1338(a); 15 U.S.C. § 1121.

2. Famolare has shown a reasonable likelihood of ultimately prevailing on the merits of its counterclaim for infringement by SCOA of Famolare's registered trademark "Get There" for shoes.

3. Famolare has shown that it may suffer greater irreparable injury from the denial of preliminary injunctive relief than any hardship to SCOA from the granting of such relief.

4. Famolare has shown that it is entitled to a preliminary injunction against further infringement by SCOA of the "Get There" trademark. Blisscraft of Hollywood v. United Plastics Co., 294 F.2d 694, 702 (2 Cir. 1961); Saxlehner v. Eisner, 147 Fed. 189, 191 (2 Cir. 1906), cert. denied, 203 U.S. 591 (1906); Consumers Union of U.S., Inc. v. Lectra Sales Corp., 179 F.Supp. 161, 162 (S.D.N.Y. 1959).

5. The preliminary injunction sought by Famolare shall issue.

Dated: New York, New York
April 21, 1976

Inzer B. Wyatt
United States District Judge

DISTRICT COURT FILED APR 21 1976 S.D.N.Y.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- -X

SCOTT INDUSTRIES, INC.,

Plaintiff, : Civil Action No.

v. : 75 Civ. 3357

FAMOLARE, INC., : (Judge Wyatt)

Defendant.

- -X

NOTICE OF MOTION FOR REHEARING AND REARGUMENT OF DECISION

TO: FISH & NEAVE
277 Park Avenue
New York, New York 10017

Sirs:

PLEASE TAKE NOTICE that on the oral Decision of the Honorable Inzer B. Wyatt, of March 26, 1976, in this action and on the annexed Memorandum in Support of this Motion, the undersigned will move this Court, in the Courtroom of the Honorable Inzer B. Wyatt, United States District Court for the Southern District of New York, at the Courthouse, New York, New York, on the 30th day of April, 1976, at 2:30 P.M., or as soon thereafter as counsel can be heard, for reargument of the aforesaid decision under General Rules 9(m) of the United States District Court for the Southern District of New York.

New York, New York
April 20, 1976

Marvin C. Soffen
OSTROLENK, FABER, GERB & SOFFEN
Attorneys for all Defendants
260 Madison Avenue
New York, New York 10016
(212) 685-8470

(49)

Plaintiff,

v.

[illegible], INC.,

Defendant.

NOTICE OF MOTION FOR REHEARING AND REARGUMENT OF DECISION; and SUPPORTING MEMORANDUM

OSTROLENK, FABER, GERB & SOFFEN
Attorneys for Plaintiff
Office and Post Office Address, Telephone
260 Madison Avenue
Borough of Manhattan New York, N. Y. 10016
(212) 685-8470

To FISH & NEAVE
277 Park Avenue
New York, New York 10017
Attorney(s) for Defendant

Service of a copy of the within is hereby admitted.
Dated,

Attorney(s) for

Sir:— Please take notice
NOTICE OF ENTRY
that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on
NOTICE OF SETTLEMENT
that an order of which the within is a true copy will be presented for
settlement to the HON. one of the judges
of the within named court, at
on the day of 19 at M.
Dated,

Yours, etc.
OSTROLENK, FABER, GERB & SOFFEN
Attorneys for
Office and Post Office Address, Telephone
260 Madison Avenue
Borough of Manhattan New York, N. Y. 10016
(212) 685-8470

To
Attorney(s) for

RECEIVED APR 21 1976

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APR 20 1976 4:45 P.M.
FISH & NEAVE
ATTORNEY FOR Plaintiff
BY

If oral argument is needed on this motion we would like to be advised. So Ordered April 21, 1976 Inzer B. Wyatt U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SCOA INDUSTRIES INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 75-3357
FAMOLARE, INC.,	:	(Judge Wyatt)
Defendant.	:	

NOTICE OF APPEAL

Notice is hereby given that Scoa Industries Inc., plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from an Order granting defendant's Motion for Preliminary Injunction entered by the District Court on the 21st day of April 1976.

OSTROLENK, FABER, GERB & SOFFEN

Marvin C. Soffen
Attorneys for Plaintiff
260 Madison Avenue
New York, New York 10016
(212) 685-8470

Dated: May 18, 1976

To:

Clerk of the Court of Appeals

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